(19,460 and 19,461.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904

No. 360.

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY, APPELLANT,

vs.

WILLIS G. BOWLAND, AS TREASURER, AND L. EWING JONES, AS AUDITOR OF FRANKLIN COUNTY, OHIO; ARTHUR I. VORYS, AS SUPERINTENDENT OF INSURANCE, AND WILLIAM S. McKINNON, AS TREASURER OF THE STATE OF OHIO.

No. 361.

WILLIS G. BOWLAND, AS TREASURER, AND L. EWING JONES, AS AUDITOR OF FRANKLIN COUNTY, OHIO, ET AL., APPELLANTS,

vs.

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

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1 THE UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, Eastern Division, }

At a stated term of the circuit court of the United States of America, within and for the eastern division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court rooms at the city of Columbus, Ohio, in said district, on the first Tuesday of June being also the seventh day of that month, in the year of our Lord, one thousand nine hundred and four, and of the American Independence, the one hundred and twenty-eighth.

Present the honorable, Albert C. Thompson, district judge. Sitting and holding circuit court.

Among the proceedings had were the following—to-wit:

THE SCOTTISH UNION AND NATIONAL INSURance Company, Complainant,
vs.
WILLIS G. BOWLAND, L. EWING JONES, ARTHUR I. VORYS, and William S. McKinnon, Defendants. } Bill of Complaint.

Be it remembered, that heretofore to-wit: on the 20th day of April, in the year of our Lord one thousand nine hundred and four, came the complainant by his attorney and filed in the clerk's office of said court his certain bill of complaint, which said bill of complaint is clothed in the words and figures following, to-wit:

Bill of Complaint.

Circuit Court of the United States, Southern District of Ohio, Eastern Division, ss.

2 THE SCOTTISH UNION AND NATIONAL Insurance Company, Complainant,
vs.
WILLIS G. BOWLAND, L. EWING JONES, ARTHUR I. VORYS, and William S. McKinnon, Defendants. } Bill of Complaint.

To the judges of the circuit court of the United States for the southern district of Ohio, eastern division:

The Scottish Union and National Insurance Company a corporation organized under the laws of Great Britain and a subject of Great Britain, brings this, its bill of complaint, against Willis G.

Bowland and L. Ewing Jones, residents of the city of Columbus, county of Franklin, and State of Ohio, Arthur I. Vorys, a resident of the city of Lancaster, county of Fairfield, and State of Ohio, and William S. McKinnon, a resident of the city of Ashtabula, county of Ashtabula, and State of Ohio, each and every of them being citizens of the State of Ohio.

Your orator respectfully shows to the court that the matter in dispute in the above entitled cause exceeds, exclusive of interest and costs, the sum or value of two thousand dollars ($2,000.00).

The defendant, Willis G. Bowland, is the duly elected, qualified and acting treasurer of said Franklin county, Ohio; the defendant L. Ewing Jones, is the duly elected, qualified and acting auditor of said Franklin county, Ohio, the defendant, Arthur I. Vorys,
3 is the duly appointed, qualified and acting superintendent of insurance of the State of Ohio; and the defendant, William S. McKinnon, is the duly elected, qualified and acting treasurer of the State of Ohio.

Complainant says that it is engaged in the business of insuring property against loss and damage by fire, with its home office in the city of Edinburgh, Scotland, and its chief office in the United States in the city of Hartford, State of Connecticut, from which latter office it conducts all its business in Ohio; that it has complied with all the statutory requirements of the State of Ohio regulating its admission to said State for the purpose of transacting its business therein; that it has been for 17 years last past duly licensed and lawfully engaged in said business in the State of Ohio; that, as one of the conditions to its right to do business in the State of Ohio, and in compliance with the statute in such cases made and provided, it deposited, on the 14th day of September, 1894, fifty thousand dollars ($50,000.00), par value, and, on the 7th day of November, 1894, an additional fifty thousand dollars ($50,000.00), of municipal bonds of the county of Lucas, in the State of Ohio, with the superintendent of insurance of the State of Ohio, at the city of Columbus, county of Franklin, in said State, for the benefit and security of the policy holders of the complainant residing in the State of Ohio; that said bonds were deposited as a trust fund for the benefit and security of the policy holders of complainant residing in Ohio, under the provisions of the statutes of the State of Ohio for such cases made and provided; that said municipal bonds thereafter remained so deposited with said superintendent of insurance until the 2nd day of April,
1903, and no longer, when they were wholly withdrawn from
4 such deposit and removed from the State of Ohio and wholly outside the borders of said State, and when there was exchanged and substituted therefor by the complainant *in* such deposit of bonds of the United States of America in the said sum of one hundred thousand dollars, ($100,000.00), par value; that said municipal bonds, so on deposit as aforesaid from the 14th day of September, 1894, and the 7th day of November, 1894, respectively as aforesaid to the 2nd day of April, 1903, were in accordance with section 2711-20 of the Revised Statutes of Ohio, registered bonds of

said municipality registered in the name of the said superintendent of insurance, for the benefit and security of the policy holders of the complainant residing in the State of Ohio; and that said municipal bonds, during the entire period of their deposit as aforesaid, were in the custody of the treasurer of the State of Ohio, the same having been delivered to him by the superintendent of insurance as provided by law.

That, upon application of this complainant theretofore made as provided by law to be made, the said superintendent of insurance, upon the receipt by him from this complainant of the sum of one hundred thousand dollars, ($100,000.00), par value, of bonds of the United States of America so exchanged and substituted for the same and deposited in lieu thereof as aforesaid, did, on or about the said 2nd day of April, 1903, withdraw, upon his written order as provided by law, the said municipal bonds from their deposit with the treasurer of the State of Ohio where they had been deposited according to the statute of said State for such cases made and provided, and did, on said date, deliver the said municipal bonds to this com-
5 plainant, who then and thereupon wholly removed the said municipal bonds from and outside of the borders of the State of Ohio, since which the said bonds have not been, nor have any of them, been, within the borders of the State of Ohio, but each and all of them have been and are now, as well the beneficial ownership as the paper evidence of the bonds themselves, wholly outside of the borders of the State of Ohio.

That the defendant, Arthur I. Vorys, has been the duly qualified and acting superintendent of insurance in and for the State of Ohio since the 3rd day of June, 1900, and is and has been continuously during said period a resident of Fairfield county, Ohio, in which county he has during all of said period returned and still returns his property for taxation; and that during the period from the 14th day of September, 1894, to the 3rd day of June, 1900, both inclusive, the office of superintendent of insurance of the State of Ohio was occupied by persons who were residents of other counties than the said county of Franklin, of the State of Ohio, in which other counties they respectively returned their property for taxation during each of the several years of said period.

Complainant says that it is not now and never has been a resident or citizen of the State of Ohio; that during the period beginning with the year 1894 and ending at the present time, complainant has made all returns required of it by the laws of Ohio governing foreign fire insurance companies to the several State and county officers of said State, and has paid all taxes and assessments that have been levied or assessed against it; but that neither complainant nor the superintendent of insurance of said State, nor the treasurer of said State, returned said municipal bonds, or any of them, for taxation in any of said years of their deposit as
6 aforesaid, acting under the honest belief that said bonds were not taxable in or by the State of Ohio.

Complainant says that said bonds of the United States which were substituted for said municipal bonds as aforesaid, are now on deposit with said superintendent of insurance at Columbus, Ohio, and that the complainant has other property in said Franklin county and in the State of Ohio.

Complainant says that, under the statutes of Ohio only personal property in Ohio, and moneys, credits and investments in bonds in the possession or under the control of persons residing in Ohio on the 12th day of April, 1903, were returnable in said State for taxation for the year 1903.

Complainant says that under date of the — day of September, 1900, this complainant was served with notice from the auditor of Franklin county, Ohio, to appear before him and be examined in regard to property omitted from the tax duplicate for the years 1895 to 1900, inclusive; that thereafter, to wit: on the 9th day of October, 1900, the said auditor illegally entered upon the tax list of said Franklin county, and illegally assessed against this complainant personally pretended taxes for and on account of said municipal bonds for the years 1895 to 1900 inclusive; and that said pretended taxes were so assessed and entered upon said tax list in the words and figures following, to wit:

Owner's name.	Year.	Value.	Rate.	Tax by levy.	Special tax.	Grand total.
Scottish Union and National Insurance Company.....	1895	100000	2.70	$2700.		
	1896	100000	2.70	$2700.		
	1897	100000	2.70	$2700.		
	1898	100000	2.75	$2750.		
	1899	100000	2.75	$2750.		$16350
	1900	100000	2.75	$2750.	$817.50	817.50

Complainant says that under date of the 4th day of December, 1903, complainant was served with notice from the auditor of
7 Franklin county, Ohio, to appear before him and be examined in regard to property omitted from the tax duplicate for the years 1901, 1902 and 1903; that thereafter, to wit, on the 11th day of December, 1903, the said auditor illegally entered upon the tax list of Franklin county, Ohio, and illegally assessed against this complainant personally pretended taxes for and on account of said municipal bonds for the years 1901, 1902 and 1903, and that said pretended taxes were so assessed and entered upon said tax list in the words and figures following, to wit:

Owner's name.	Year.	Value.	Rate.	Tax by levy.	Special tax.	Grand total.
Scottish Union and National Insurance Company	1901	100000	2.85	$2850.		
	1902	100000	2.75	$2750.		
	1903	97000	3.00	$2910.	$425.50	$8510. 425.50

Complainant says that said municipal bonds were not taxable, nor were any of them taxable, in said Franklin county during the years 1895 to 1903, inclusive, or any of said years or any part of any of them, under any law of the State of Ohio.

Complainant says that the treasurer of said Franklin county has never caused said municipal bonds, or any of them, to be attached or distrained, nor has he ever taken possession of, or attempted in any way to take possession of, said bonds, or any of them, for the purpose of enforcing the payment of the said pretended taxes so assessed as aforesaid, or any part of same, out of said bonds, or any of them, and has taken no steps whatever for the enforcement of the payment of said pretended taxes so assessed out of said bonds themselves, or any of them; and that, at the time the said bonds were sent out of and removed from the State of Ohio as aforesaid, there was no lien upon or other charge against said bonds, or any of
8 them, for the taxes for the years 1895 to 1903, inclusive, or any part of any one of said years.

That, under the provisions of section 2859, of the Revised Statutes of Ohio, in addition to the other remedies provided by law for the collection of taxes assessed in respect of personal property, the treasurer of a county in Ohio is specially authorized and empowered, when any personal taxes shall stand charged against any person, and the same shall not be paid within the time prescribed by law for the payment of such taxes, to enforce the collection by a civil action in the name of the treasurer of said county against such person for the recovery of such unpaid taxes; and it is further provided, in and by said statute, that, if on the trial of such action, it shall be found that such person is so indebted as charged, judgment shall be rendered against such person in favor of said treasurer so prosecuting said action, as in other cases.

That the auditor of said Franklin county has certified for collection all the said pretended taxes so levied and assessed as aforesaid against complainant by reason of said municipal bonds to the treasurer of said county; that, on or about the 15th day of November, 1900, an action against complainant, under the provision of said section 2859, to collect the taxes so assessed against complainant as above alleged for the years 1895 to 1900, inclusive, was commenced

in the court of common pleas of Franklin county, State of Ohio; and that said action is still pending.

That complainant has not now, and never has acquired, a residence in the State of Ohio; that said statute, in so far as it attempts to give a right to collect said pretended taxes against this complainant by personal judgment, is unconstitutional and void, being in violation of the fourteenth amendment of the Constitution of the United States and of the treaty rights of complainant as a subject of Great Britain; and that any effort on the part of the said defendant,
9 Bowland, as treasurer of said Franklin county, to collect said pretended taxes upon or on account of said municipal bonds, or any of them, against this complainant personally would be and is without due process of law and in violation of the fourteeth amendment of the Constitution of the United States and of the treaty right of complainant as a subject of Great Britain.

That, under the provisions of section 1095 of the Revised Statutes of Ohio, a treasurer of a county in Ohio is specially authorized and empowered, when taxes are past due and unpaid, to distrain sufficient goods and chattels belonging to the person charged with such taxes, if found within the county, to pay the taxes so remaining due and the costs that have accrued, the said statute further authorizing said treasurer to advertise and sell the property so distrained at public sale.

Complainant says that the said municipal bonds, in respect of which the said pretended taxes have been assessed against complainant as above alleged, being no longer within the State of Ohio, or subject to distraint or attachment at the hands of said Bowland as treasurer, he, the said Bowland, as said treasurer, threatens to and will, unless restrained by this court, distrain, or attempt to distrain, and sell, or attempt to sell, claiming to act in that behalf under the provisions of said section 1095, the said bonds of the United States belonging to complainant and now on deposit with the superintendent of insurance of the State of Ohio as aforesaid, or other personal property of complainant which may now or hereafter be situate in said Franklin county, or the State of Ohio; and that said
10 Arthur I. Vorys and William S. McKinnon threaten to and will, unless restrained by this court, deliver over to the said Bowland, as said treasurer, all or some of said bonds of the United States so deposited by complainant, as aforesaid.

Complainant says that, in so far as said section 1095 attempts to give said defendant, Bowland, as said county treasurer, the right and power of collecting said pretended taxes against complainant by distraint against the goods and chattels belonging to complainant, even if the same be found within the said Franklin county, is unconstitutional and void, being in violation of the fourteenth amendment of the Constitution of the United States and the treaty rights of complainant as a subject of Great Britain, and that any effort on the part of said Bowland, as said treasurer, to distrain said bonds of the United States, or other personal property of complainant, or

any effort on the part of defendants, Arthur I. Vorys and William S. McKinnon, or either of them, to deliver to said defendant, Bowland, as said treasurer, either upon his demand or otherwise, the said bonds of the United States, or any of them, deposited with the superintendent of insurance as aforesaid, would be and is without due process of law and in violation of the fourteenth amendment of the Constitution of the United States and of the treaty rights of complainant as a subject of Great Britain.

Complainant represents that, by statute of the State of Ohio it is expressly provided that suits may be brought and maintained in equity to enjoin the illegal levy of taxes and assessments, or their collection; and that, by the law of the State of Ohio, complainant has no remedy at law against these defendants, or either of
11 them, to prevent the collection of the said pretended taxes so assessed as aforesaid, on account of said municipal bonds, against it personally, or to prevent the distraining and sale of its personal property situate or which may be situate in said county of Franklin.

Wherefore, complainant prays that the said defendant, Bowland, as treasurer of Franklin county, Ohio, be temporarily restrained from collecting, or attempting to collect, any of said pretended taxes against complainant personally; that said defendant, Bowland, be restrained from collecting, or attempting to collect, the said pretended taxes, or any portion of them, by distraint, against either said bonds of the United States so deposited as aforesaid, or any personal property of complainant which may now or hereafter be situate in the said county of Franklin, or the State of Ohio; that said defendants, Arthur I. Vorys as superintendent of insurance, and William S. McKinnon, as treasurer of the State of Ohio, be temporarily restrained from delivering, or attempting to deliver, said bonds of the United States on deposit with them or any part of same, to the said Willis G. Bowland, as said treasurer as aforesaid; and that, upon final hearing herein, said injunctions be made perpetual; and for such other and proper relief as equity and good conscience may require.

May it please this honorable court to grant to complainant a writ of subpœna directed to the said Willis G. Bowland, L. Ewing Jones, Arthur I. Vorys and William S. McKinnon commanding them on a day certain and under a certain penalty to be therein inserted, personally to appear before this honorable court then and there to answer the premises and to stand and abide such order and decree herein as to this court shall seem agreeable to equity and good conscience.

W. O. HENDERSON,
HARTWELL CABELL,
Solicitors for Complainant.

12 And thereupon, there was issued out of the clerk's office of the court aforesaid, our certain writ of subpœna in chancery

in this cause, directed to the marshal of said district and against the said defendant, which said subpœna is clothed in the words and figures following, to-wit:

Subpœna.

UNITED STATES OF AMERICA,
Southern District of Ohio, Eastern Division, } ss:

The President of the United States of America to the marshal of the southern district of Ohio, Greeting:

You are hereby commanded to summon Willis G. Boland and L. Ewing Jones, of Columbus, Ohio, Arthur I. Vorys, of Lancaster, Ohio, and William S. McKinnon, of Ashtabula, Ohio, citizen of and resident in the State of Ohio, if they be found in your district, to be and appear in the circuit court of the United States for the eastern division of the southern district of Ohio, aforesaid at Columbus, on the first Monday in July next, to answer a certain bill in chancery, filed and exhibited in said court, against them by the Scottish Union and National Insurance Company, a corporation organized under the laws of Great Britain, and a subject of Great Britain.

Hereof you are not to fail under the penalty of the law thence ensuing. And have you then and there this writ.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 21st day of April A. D. 1904, and in the 128th year of the Independence of the United States of America.

Attest:

[SEAL.] B. R. COWEN, *Clerk.*

13

Memorandum.

The said defendants are required to enter their appearance in this suit in the clerk's office of said court on or before the first Monday of June 1904. Otherwise the said bill may be taken *pro confesso.*

B. R. COWEN, *Clerk.*

And afterwards to-wit: on the 4th day of May in the year last aforesaid, came the marshal of said district to whom the said subpœna was in form directed and returned the same into the clerk's office of said court, endorsed as follows, to-wit:

To the clerk of said court:

In the above cause, please enter the appearance of Willis G. Bowland and L. Ewing Jones as defendants, and E. L. Taylor, Jr., A. T. Seymour, Karl T. Webber and Wilber E. King, as their solicitors.

WILLIS G. BOWLAND,
L. EWING JONES,
By EDWARD L. TAYLOR, JR.,
SEYMOUR, WEBBER & KING,
Their Attorneys.

In the above cause please enter the appearance of Arthur I. Vorys, and Wm. S. McKinnon as defendants and Wade H. Ellis as their solicitor.

ARTHUR L. VORYS AND
WM. S. McKINNON,
By WADE H. ELLIS,
Attorney Gen.

And afterwards, to-wit: on the 19th day of May A. D. 1904. A demurrer was filed in the clerk's office of said court, clothed in the words and figures following to-wit:

Demurrer of Willis G. Bowland.

14 THE SCOTTISH UNION AND NATIONAL Insurance Company, Complainant,
vs.
WILLIS G. BOWLAND, L. EWING JONES, Arthur I. Vorys, and William S. McKinnon, Defendants.
No. 1168. In Equity.

Demurrer of Willis G. Bowland, as treasurer of Franklin county, Ohio, to the bill of complaint of The Scottish Union and National Insurance Company, complainant.

To the judges of the circuit court of the United States for the southern district of Ohio, eastern division:

This defendant by protestation, not confessing nor acknowledging all or any of the matters and things in said bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, demurs to so much and such part of said bill of complaint as seeks to enjoin and restrain this defendant Willis G. Boland as treasurer of Franklin county Ohio, from collecting or attempting to collect the taxes alleged in said bill of complaint, by an action against complainant under the provisions of section 2859 of the Revised Statutes of Ohio, which section especially authorizes and empowers the treasurer of any county when any personal taxes shall stand charged against any person and the same shall not be paid within the time prescribed by law for the payment
of such taxes, to enforce the collection by a civil action in the
15 name of the treasurer of said county against such person for the recovery of such unpaid taxes, and on the trial of such action if it shall be found that such person is so indebted as charged, judgment shall be rendered against such person in favor of said treasurer so prosecuting said action as in other cases.

For cause of demurrer, this defendant shows that the complainant has not in and by its said bill made or stated such a case as entitles it in a court of equity to the relief against this defendant, restraining

him from proceeding to collect said taxes as provided by section 2859 of the Revised Statutes of Ohio.

And for further cause of demurrer this defendant shows that complainant is not entitled to sustain said bill for the reason that it has a full, complete and adequate remedy at law.

This defendant further by protestation, not confessing nor acknowledging all or any of the matters and things in said bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, demurs to so much and such part of said bill of complaint as seeks to enjoin and restrain this defendant Willis G. Bowland as treasurer of Franklin county, Ohio, from collecting or attempting to collect the taxes alleged in said bill of complaint or any portion of them by distraint against either said bonds of the United States deposited as alleged in said bill or any personal property of complainant which may now or hereafter be situated in said county of Franklin, or the State of Ohio, under the provisions of section 1095 of the Revised Statutes of Ohio, which especially authorizes and empowers the treasurer of any county in Ohio when taxes are past due and unpaid to distrain sufficient goods and chattels belonging to the person charged with said taxes, if found within the county, to pay the taxes so remaining due and *and* the costs that have accrued, and authorizing said
16 treasurer to advertise and sell the property so distrained at public sale.

For cause of demurrer this defendant shows that the complainant has not in and by its said bill made or stated such a case as entitles it in a court of equity to the relief against this defendant restraining said defendant from proceeding to collect said taxes by virtue of the provisions of said section 1095 of the Revised Statutes of Ohio.

Wherefore, and for divers other good causes of demurrer appearing in said bill, this defendant demurs separately and severally to the parts in said bill above specified, and to all matters and things therein contained, and humbly prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to such parts of the said bill as are so demurred to as aforesaid, or either of them, and prays to be dismissed with his costs and charges in this behalf most wrongfully sustained.

For further cause of demurrer, the defendant, Willis G. Bowland, as treasurer of Franklin county, Ohio, by protestation, not confessing or acknowledging all or any of the matters and things in complainant's bill to be true in such manner and form as the same are therein set forth and alleged, doth demur to said bill of complaint generally and for cause of demurrer shows that the said complainant has not in and by the said bill made or stated any such cause as doth or ought to entitle it to any such recovery or relief as is thereby sought and prayed for from or against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in said bill of complaint, this defendant doth demur thereto

generally and doth humbly demand the judgment of this court whether he shall be compelled to make any further or other answer to said bill and to be hence dismissed with his costs
17 as heretofore prayed most wrongfully sustained.

EDWARD L. TAYLOR, JR.,
AUGUSTUS T. SEYMOUR,
KARL T. WEBBER, AND
WILBUR E. KING,
Attorneys for Defendant.

UNITED STATES OF AMERICA,
Southern District of Ohio, Eastern Division, } *ss:*
County of Franklin, Ohio,

Willis G. Bowland, makes solemn oath and says that he is the above-named defendant, and that the foregoing demurrer is not interposed for delay and that the same is true in point of fact.

WILLIS G. BOWLAND.

Subscribed and sworn to before me this 17th day of May, 1904.

KARL T. WEBBER,
[SEAL.] *Notary Public in and for Franklin County, Ohio.*

I hereby certify that in my opinion, the foregoing demurrer is well founded in point of law.

AUGUSTUS T. SEYMOUR,
Of Counsel for Defendant.

And afterwards, to-wit: on the 21st day of May A. D. 1904, a demurrer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY, Complainant,
vs.
WILLIS G. BOWLAND, L. EWING JONES, Arthur I. Vorys, and William S. McKinnon, Defendants. } No. 1168. In Equity.

18 Demurrer of Arthur I. Vorys and William S. McKinnon to the bill of complaint of The Scottish Union and National Insurance Company, complainant.

To the judges of the circuit court of the United States for the southern district of Ohio, eastern division:

These defendants, Arthur I. Vorys and William S. McKinnon, each for himself, respectively, by protestation, not confessing nor acknowledging all or any of the matters and things in said bill of complaint

contained to be true in such manner and form as the same are therein and thereby set forth and alleged, demurs thereto and for cause of demurrer shows that complainant has not in and by its said bill made or stated such a case as entitled it in a court of equity to the relief asked against these defendants, or either of them, restraining them from delivering or attempting to deliver bonds of the United States on deposit with them as alleged in said bill.

Wherefore, and for divers other causes of demurrer appearing in the said bill, these defendants, respectively, demur thereto, and to all matters and things therein contained, and pray the judgment of this honorable court whether they or either of them shall be compelled to make any further or other answer to said bill, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

ARTHUR I. VORYS,
WILLIAM S. McKINNON,
By WADE H. ELLIS,
Attorney General.

19 UNITED STATES OF AMERICA,
Southern District of Ohio, Eastern Division, } *ss:*
County of Franklin, O.,

Arthur I. Vorys makes solemn oath and says that he is one of the above named defendants, and that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact.

A. I. VORYS.

Subscribed and sworn to before me this 19th day of May, 1904.

DAVID A. JONES,
[SEAL.] *Notary Public in and for Franklin County, Ohio.*

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

WADE H. ELLIS,
Counsel for Defendants Vorys & McKinnon.

And afterwards, to-wit: on the 26th day of May A. D. 1904, a demurrer was filed in the clerk's office of said court, clothed in the words and figures following to-wit:

Demurrer of Willis G. Bowland as Treas., etc., and L. Ewing Jones, etc.

20 THE SCOTTISH UNION AND NATIONAL Insurance Company, Complainant,
vs.
WILLIS G. BOLAND, L. EWING JONES, Arthur I. Vorys, and William S. McKinnon, Defendants.
No 1168. In Equity.

Demurrer of Willis G. Bowland, as treasurer of Franklin county, Ohio, and L. Ewing Jones, as auditor of Franklin county, Ohio, to the bill of complaint of the Scottish Union and National Insurance Company.

To the judges of the circuit court of the United States for the southern district of Ohio, eastern division:

The defendants, Willis G. Bowland, as treasurer, and L. Ewing Jones, as auditor of Franklin county, Ohio, each for himself respectively, by protestation, not confessing, nor acknowledging all or any of the matters and things in said bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, demurs to so much and such part of said bill of complaint as seeks to enjoin and restrain the defendant Willis G. Bowland, as treasurer of Franklin county, Ohio, from collecting or attempting to collect the taxes, or any part thereof, alleged in said bill of complaint to have been assessed and entered upon the tax list of Franklin county, Ohio, in the name of complainant for the years 1895, 1896, 1897, 1898, 1899, 1900, 1901 and 1902, by a dis-
21 traint against either the bonds of the United States deposited as alleged in said bill of complaint or any personal property of complainant, which may now or hereafter be situated in said county of Franklin or the State of Ohio, under the provisions of section 1095 of the Revised Statutes of Ohio, which specially authorizes and empowers the treasurer of any county, in Ohio when taxes are past due and unpaid to distrain sufficient goods and chattels belonging to the person charged with said taxes if found within the county, to pay the taxes so remaining due and the costs that have accrued and authorizing said treasurer to advertise and sell the property so distrained at public sale.

For cause of demurrer these defendants show that the complainant has not in and by its said bill made or stated such a case as entitles it in a court of equity to the relief against the defendant Bowland, as treasurer, restraining said defendant from proceeding to collect the taxes for said years 1895 to 1902 inclusive, by virtue of the provisions of said section 1095 of the Revised Statutes of Ohio.

These defendants further by protestation, not confessing nor acknowledging all or any of the matters and things in said bill of

complaint contained to be true, in such manner and form as the same are therein and thereby set forth and alleged, each for himself, demurs to so much and such part of said bill of complaint as seeks to enjoin and restrain the defendant Bowland as treasurer of Franklin county, Ohio, from collecting or attempting to collect the taxes alleged in said bill of complaint to be assessed and entered upon the tax list of Franklin county, Ohio, against complainant for the years 1895, 1896, 1897, 1898, 1899, 1900, 1901, and 1902, by an action against complainant under the provisions of section 2859 of the Revised Statutes of Ohio, which section especially authorizes and empowers the treasurer of any county when any personal taxes shall stand charged against any person and the same shall not be paid within the time prescribed by law for the payment of such
22 taxes, to enforce the collection thereof by a civil action in the name of the treasurer of said county against said person, for the recovery of such unpaid taxes, and on the trial of such action, if it shall be found that such person is so indebted as charged, authorize judgment to be rendered against such person in favor of said treasurer so prosecuting said action as in other cases.

For cause of demurrer these defendants show that the complainant has not in and by its said bill made or stated such case as entitled it in a court of equity — against the defendant Bowland, as treasurer, restraining him from proceeding to collect said taxes for the years 1895 to 1902 inclusive by virtue of the provisions of said section 2859 of the Revised Statutes of Ohio.

And for further cause of demurrer these defendants show that complainant is not entitled to sustain said bill for the reason that it has a full, complete and adequate remedy at law.

These defendants further by protestation, not confessing nor acknowledging all or any of the matters and things in said bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, each for himself demurs to so much and such part of said bill of complaint as seeks to enjoin and restrain the defendant Willis G. Bowland as treasurer, from collecting or attempting to collect the taxes alleged in said bill of complaint to be assessed and entered upon the tax list against complainant for the year 1903, by distraint against the bonds of the United States deposited as alleged in said bill of complaint, or any personal property of complainant which may now or hereafter be situated in said county of Franklin or the State of Ohio, under
23 the provisions of section 1095 of the Revised Statutes of Ohio, which especially authorizes and empowers the treasurer of any county in Ohio when taxes are past due and unpaid to distrain sufficient goods and chattels belonging to the person charged with said taxes, if found, within the county, to pay the taxes so remaining due and the costs that have accrued and authorizing said treasurer to advertise and sell the property so distrained, at public sale.

For cause of demurrer this defendant shows that the complainant has not in and by its said bill made or stated such a case as entitles it in a court of equity to the relief against this defendant, restraining

said defendant from proceeding to collect said taxes for the year 1903 by virtue of the provisions of said section 1095 of the Revised Statutes of Ohio.

Wherefore and for divers other good causes of demurrer appearing in said bill, these defendants each for themselves respectively, demurs separately and severally to the parts of said bill of complaint above specified, and to all matters and things in said parts of said bill contained, and humbly pray the judgment of this honorable court whether they or either of them shall be compelled to make any further or other answer to such parts of the said bill as are here demurred to as aforesaid, or either of them, and pray to be dismissed with their costs and charges in this behalf most wrongfully sustained.

For further cause of demurrer, these defendants, by protestation, not confessing nor acknowledging all or any of the matters and things in the complainant's bill to be true, in such manner and form as the same are therein set forth and alleged, each for himself demurs to said bill of complaint generally and for cause of demurrer shows that the said complainant has not in and by said bill made or
24 stated any such cause as doth or ought to entitle it to any such recovery or relief as is thereby sought, and prayed for from or against these defendants, or either of them.

Wherefore and for divers other good causes of demurrer appearing in said bill of complaint, these defendants, each for himself, respectively, demurs thereto generally, and humbly demands the judgment of this court whether they or either of them shall be compelled to make any further or other answer to said bill and to be hence dismissed with their costs as heretofore prayed for most wrongfully sustained.

EDWARD L. TAYLOR, JR.,
AUGUSTUS T. SEYMOUR,
KARL T. WEBBER, AND
W. E. KING,
Solicitors for Defendant-.

UNITED STATES OF AMERICA,
Southern District of Ohio, Eastern Division, } *ss:*
County of Franklin, Ohio,

Willis G. Bowland, makes solemn oath and says that he is one of the above-named defendant-, and that the foregoing demurrer is not interposed for delay and that the same is true in point of fact.

WILLIS G. BOWLAND.

Subscribed and sworn to before me this 21st day of May, 1904.

KARL T. WEBBER,
[SEAL.] *Notary Public in and for Franklin County, Ohio.*

I hereby certify that in my opinion, the foregoing demurrer is well founded in point of law.

AUGUSTUS T. SEYMOUR,
Of Counsel for Defendant.

25 And afterwards to-wit: on the 26*st* day of May A. D. 1904, a demurrer was filed in the clerk's office of said court, clothed in the words and figured following, to-wit:

THE SCOTTISH UNION AND NATIONAL Insurance Company, Complainant,
vs.
WILLIS G. BOWLAND, L. EWING JONES, Arthur I. Vorys, and William S. McKinnon, Defendants.
} No. 1168. In Equity.

Demurrer of Arthur I. Vorys and William S. McKinnon to the Bill of Complaint of the Scottish and National Insurance Company.

To the judges of the circuit court of the United States for the southern district of Ohio, eastern division:

The defendants, Arthur I. Vorys as superintendent of insurance, and William S. McKinnon as treasurer of state of the State of Ohio, each for himself respectively, by protestation, not confessing nor acknowledging all or any of the matters and things in the said bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, demurs to so much and such part of said bill of complaint as seeks to enjoin and restrain said defendant Arthur I. Vorys as superintendent of insurance, and W. S. McKinnon as treasurer of the State of Ohio, from delivering or attempting to deliver the bonds of the United States on deposit as alleged in the bill of complaint, so far as said bonds are
26 sought to be distrained by Willis G. Bowland as treasurer of Franklin county to satisfy the taxes charged against complainant for the years 1895 to 1902 inclusive, as alleged in the said bill of complaint, and for cause of demurrer these defendants show that complainant has not in and by its said bill made or stated such a case as entitles it in a court of equity to the relief asked against these defendants or either of them, restraining them from delivering or attempting to deliver said bonds on deposit with them as alleged.

These defendants further by protestation, not confessing nor acknowledging all or any of the matters and things in said bill of complaint contained to be true, in such manner and form as the same are therein and thereby set forth and alleged, each for himself demurs to so much and such part of said bill of complaint as seeks to enjoin and restrain these defendants from delivering or attempting to deliver the bonds of the United States on deposit with them as alleged in the petition to Willis G. Bowland as treasurer of Franklin county,

Ohio, to satisfy the taxes charged against complainant upon the tax duplicate of Franklin county, Ohio, for the year 1903 as alleged in the said bill of complaint, and for cause of demurrer, these defendants show that complainant has not in and by its said bill made or stated such a case as entitles it in a court of equity to the relief asked against these defendants or either of them, restraining them from delivering or attempting to deliver the bonds of the United States on deposit, to the treasurer of Franklin county, Ohio, to satisfy a tax charged against complainant for the year 1903.

Wherefore, and for divers other causes of demurrer appearing in the said bill, these defendants respectively, demur thereto, and to all matters and things therein contained, and pray the judgment of this honorable court whether they or either of them shall be
27 compelled to make any further or other answer to said bill, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

WADE H. ELLIS,
Solicitor for Defendants.

UNITED STATES OF AMERICA,
Southern District of Ohio, Eastern Division, } ss:
County of Franklin, Ohio,

Arthur I. Vorys makes solemn oath and says that he is one of the above named defendants, and that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact.

ARTHUR I. VORYS.

Subscribed and sworn to before me this 26th day of May, 1904.

[SEAL.] DAVID A. JONES,
Notary Public in and for Franklin County, Ohio.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

WADE H. ELLIS,
Of Counsel for Defendants.

And afterwards, to-wit: on the 2nd day of June A. D. 1904, an opinion was filed in the clerk's office of said court, clothed in the words and figures following, to-wit:

Opinion of Judge Thompson.

28 THE SCOTTISH UNION & NATIONAL INSURANCE Company *vs.* WILLIS G. BOWLAND ET AL. } Opinion.

The COURT: I may as well dispose of this matter now; I might take time to consider it, but I do not think it would change my view of it.

The plaintiff, The Scottish Union & National Insurance Company, was permitted to do business in this State upon certain conditions; it had no right to do business in this State without permission or license, and the conditions upon which it was permitted to do business are found in section 3660:

"A company incorporated by or organized under the laws of a foreign government shall deposit with the superintendent of insurance, for the benefit and security of the policy-holders residing in this State, a sum not less than one hundred thousand dollars in stock or bonds of the United States, or the State of Ohio or any municipality or county thereof, which shall not be received by the superintendent at a rate above their par value; the stock and securities so deposited may be exchanged from time to time for other like securities; so long as the company so depositing continues solvent and complies with the laws of this State, it shall be permitted by the superintendent to collect the interest or dividends on such deposits; and for the purpose of this chapter the capital of any foreign company doing fire insurance business in this State shall be deemed to be the aggregate value of its deposits with the insurance or other departments of this State and of the other States of the United States, for the benefit of policy-holders in this State or in the United States, and its assets and investments in the United States—certified according to the provisions of this chapter; but such assets and investments must be held within the United States, and invested in and held by trustees, who must be citizens of the United States,
29 appointed by the board of directors of the company and approved by the insurance commissioners of the State, where invested, for the benefit of the policy-holders and creditors in the United States; and the trustees so chosen may take, hold and convey real and personal property for the purpose of the trust, subject to the same jurisdiction as companies of this State.

Now, in coming into this State, the complainant was required to comply with the provisions of this statute, and to know and comply with all the laws of the State which would impose any duty upon it in the carrying on of its business here. It was bound to know that the bonds (other than Government bonds) deposited under this section would be subject to taxation under the laws of Ohio and that

the bonds themselves would be subject to distraint to compel the payment of any tax levied upon them. The State said, in substance, to the complainant,—"You may do business in this State when you have deposited bonds of a certain character and amount with the superintendent of insurance; and upon these bonds, taxes will be levied as upon any other property in the State, and if you fail to pay the taxes, then to the extent of this property, you will be subject to distraint for the purpose of compelling payment of the taxes. You may, as a matter of convenience to you and as a matter of grace on our part, exchange these bonds at any time for other bonds which the superintendent of insurance will approve; that is, you may substitute other bonds for these bonds,—" and by substitution is meant the taking of the others in the place of the original bonds, for all the purposes for which the original bonds were deposited. I think it has been conceded here that the taxes levied upon the bonds originally deposited might be collected by distraint upon these bonds, if they were still within the State; but it is said they are not within the State, but that bonds of the Government of the United States have been substituted in their place and that they cannot be subject to distraint. I think that position is inconsistent with the fair construction of this statute. These Government
30 bonds now on deposit are not being taxed, they are not subject to taxation, but an attempt is made to appropriate them to the payment of taxes which were properly levied upon other bonds, for which these bonds were substituted.

Now, in order to sustain complainant's position, the court would be required to construe this statute to mean that the State deliberately provided that the insurance company might escape the obligation imposed upon it to pay these taxes, at any time it saw fit, by simply withdrawing the original bonds deposited and replacing them with other bonds.

Ordinarily the substitution of certain property for other property, means that it shall stand in the place of and represent the other for all purposes.

It seems to me that this must be held to have been the understanding between the parties here, the State and the insurance company; that the State in granting this license to do business in this State provided that these bonds might be replaced by other bonds, upon the condition that the substituted bonds should in every way take place of the original bonds, and that the State did not intend to relinquish or surrender any rights which it had, under the deposit of the original bonds. These bonds, when deposited, were held by the superintendent of insurance, not only to insure compliance with the provisions of the law protecting policy holders, but to insure compliance with the tax laws of the State. It provides that so long as the company so depositing continues solvent and complies with the laws of this State, it shall be permitted by the superintendent of insurance to collect interest and dividends on such deposit implying

that at any time, if the State should be in doubt as to its
31 solvency, it may not only hold the bonds, but hold the interest and dividends to satisfy the claims of the policy-holders, and necessarily, the just claims of the State.

The right of the State to tax the property of non-residents brought within the State, is not disputed, and there is nothing in this law exempting as property the bonds of the original deposit from taxation. The company was bound to know that they would be subject to taxation and that, to their full value, they would be made available for the payment of any taxes which the State might lay upon them. The process of distraint is one which the statutes of the State provide and of which the complainant was bound to take notice.

These bonds are here, within the State, the property of the complainant, substituted for the original bonds; and the claim of the complainant is that under the true construction of this statute, they are not subject to distraint, because they are not the bonds upon which the tax was levied. This claim ignores the fact and the purpose of the substitution, and treats the claim of the State as an attempt to levy and collect a tax upon an original deposit of non-taxable bonds.

I have not read the bill, but in so far as the demurrers touch these questions, I think they are well taken and should be sustained. An entry may be prepared, however, eliminating the claim for taxes for 1903, because the old bonds were not converted into Government bonds for the purpose of evading or escaping taxation, but were exchanged for Government bonds under the provisions of section 3660; and the spirit and purpose of the law concerning evasions do not apply to this case. These bonds cannot be appropriated to the payment of the taxes assessed in 1903. The entry
32 will conform to the opinion that has just been delivered. If there be other questions covered by the demurrers, I have not ruled upon them, and the entry must conform to the points I have ruled upon.

Mr. ——: The bill asks for relief against the property, to prevent him from collecting under section 2859; it is based upon the same identical process of law——

The COURT: That is, by suit?

Mr. ——: By suit, because the statute of Ohio requires the company to——

The COURT: You cannot maintain a suit to recover a personal judgment.

Mr. ——: No; but the statutes provide that any foreign insurance company that wishes to do business in this State, shall acknowledge the jurisdiction of the State courts and shall take no appeal or writ of error from any judgment which is rendered by virtue of jurisdiction obtained in that way. Counsel, as I understand it, made the statement that if our right to distrain is proper against this property, we have the same right, under the same theory of law, to bring this personal action, in event we cannot find property

to distrain. We do not claim that we get jurisdiction that will go beyond the State——

The COURT: You might proceed against these bonds by suit but you cannot obtain a personal judgment. Your claim is, that you have a right to institute a personal action and obtain a personal judgment against this corporation, with a view to asserting it,
33 wherever the complainant may be found, in any other State or country, make it a debt of record which could be enforced by suit as such, in any other State or country?

Mr. HENDERSON: The bill alleges that such a suit has been brought and is now pending.

The COURT: I will not take the time to look it up. I will take the chances and rule against you.

Mr. ——: It might not be our claim; but that is the effect that would give to the statute.

Mr. HENDERSON: Then the demurrer on that part of the bill will be overruled, and the demurrer to the other part will be sustained.

And afterwards, to-wit: on the 9th day of June, A. D. 1904 an entry was made upon the journal of said court clothed in the words and figures following to-wit—

Entry, J. F. P., 11.

On application of defendants herein, and with the consent of complainant, the demurrer of Willis G. Bowland heretofore filed herein on the 19th day of May, 1904, and the demurrer of Arthur I. Vorys and William S. McKinnon, filed on the 21st day of May, 1904, are hereby withdrawn and the demurrers of each of said defendants filed on the 26th day of May, 1904, are substituted therefor.

And afterwards, to wit: on the 20th day of June, A. D. 1904 an entry was made upon the journal of said court clothed in the words and figures following, to-wit,

And now, to-wit, on the 20th day of June 1904, this cause having been finally submitted to the court upon the bill of complaint and the several demurrers filed thereto by the defendants, after
34 argument of counsel and due deliberation being had in the premises, it is now ordered, adjudged and decreed as follows:

That each and all of the said demurrers to so much and such parts of the bill of complaint as seek to enjoin and restrain the defendant, Willis G. Bowland as treasurer of Franklin county, Ohio, from collecting or attempting to collect the said taxes as alleged in the bill of complaint, except so much thereof as were levied for the year 1903, by distraint, under the provisions of section 1095 of the Revised Statutes of Ohio, of said United States bonds as alleged in said bill, or sufficient of said bonds to pay said taxes as aforesaid and the costs that have accrued in that behalf, and as also seek to enjoin and restrain the defendants, Arthur I. Vorys, as superintend-

ent of insurance of the State of Ohio and William S. McKinnon as treasurer of the State of Ohio from surrendering and delivering to the said defendant, Willis G. Bowland as treasurer of Franklin county, Ohio, said United States bonds, or sufficient of them, under said alleged threatened distraint of the same, to pay the said taxes and costs as aforesaid, or to so much and to such parts of said bill of complaint as seek any part of such relief, be and the same are hereby sustained; that each and all of said demurrers to so much and such parts of the bill as seek to enjoin and restrain the defendant, Willis G. Bowland, as treasurer of said Franklin county, Ohio, from collecting or attempting to collect so much of said taxes as were levied for the year 1903, as alleged in the bill of complaint, by distraint of said United States bonds or sufficient of them and as also seek to enjoin and restrain the defendants, Arthur I. Vorys as superintendent of insurance of the State of Ohio and William S. McKinnon as treasurer of the State of Ohio, from surrendering and delivering to the said defendant, Willis G. Bowland as treasurer of Franklin county, Ohio, said United States bonds, or sufficient of them, under said alleged threatened distraint of the same, to pay the said alleged taxes levied for the
35 year 1903, or to so much and such parts of said bill of complaint as seek any part of such relief, be and the same are hereby overruled; that each and all of said demurrers to so much and such parts of said bill of complaint as seek to enjoin and restrain the defendant, Willis G. Bowland as treasurer of Franklin county, Ohio, from collecting or attempting to collect the said taxes as alleged in said bill of complaint, or any part thereof, by civil action against complainant under the provisions of section 2859 of the Revised Statutes of Ohio, be and the same are hereby overruled; and that each and all of said demurrers generally to the bill of complaint be and the same are hereby overruled.

It is, therefore, further ordered, adjudged and decreed as follows:—

That the defendant, Willis G. Bowland, as treasurer of Franklin county, Ohio, be and he hereby is perpetually enjoined and restrained from collecting or attempting to collect all or any part of the said taxes as alleged in the bill of complaint, by civil action against complainant under the provisions of section 2859 of the Revised Statutes of Ohio; that the alleged levy of taxes against complainant for the year 1903 as alleged in the bill of complaint, the amount claimed by reason thereof being the sum of $2910, together with five per cent. penalty thereon, was and is wholly illegal and void, and the defendant Willis G. Bowland, as treasurer as aforesaid, be and he hereby is perpetually enjoined and restrained from collecting or attempting to collect, by distraint or otherwise, the whole or any part of said alleged taxes so levied for the year 1903, as alleged in the said bill of complaint.

That the taxes as alleged in the bill of complaint which were

levied for the years 1895 to 1902, inclusive were legally levied
36 for each of the said years upon said municipal bonds as alleged in the bill of complaint; and that the complainant is not entitled to an injunction to enjoin and restrain the defendant, Willis G. Bowland, as treasurer as aforesaid from collecting or attempting to collect so much of the said taxes as alleged in said bill of complaint as were levied for the years 1895 to 1902 inclusive, by distraint, under the provisions of said section 1095 of the Revised Statutes of Ohio, of said United States bonds or sufficient of them, or to enjoin and restrain the defendants, Arthur I. Vorys, as superintendent of insurance as aforesaid, and William S. McKinnon as treasurer of State as aforesaid, from surrendering or delivering to said Willis G. Bowland as treasurer as aforesaid, said United States bonds, or sufficient of them, to pay such of said taxes as were levied for the years 1895 to 1902, inclusive, and the costs that have accrued in that behalf, and the prayer of the bill of complaint in that behalf be and hereby is denied, for want of equity in said bill.

Judgment is hereby rendered against the complainant for the costs of the action taxed at $—

To all of which findings, rulings, orders, judgments and decrees against the defendants, the defendants and each of them, by their counsel, except, and ask that their exceptions be noted of record, which is accordingly done; and to each and all of which findings, rulings, orders, judgments and decrees, against complainant, the complainant, by its counsel, excepts, and asks that its exceptions be noted of record, which is accordingly done.

And thereupon, upon application of the complainant and of the defendants, the court fixes the amount of the appeal bond to be given in case of an appeal of this cause by either party at the sum of $500.00.

37 And afterwards, to-wit: on the 24th day of June A. D. 1904. a stipulation was filed in the clerk's office of said court, clothed in the words and figures following, to-wit:

Stipulation.

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY, Complainant, *vs.* WILLIS G. BOWLAND, L. EWING JONES, Arthur I. Vorys, and William S. McKinnon, Defendants.	No. 1168.	In Equity.

It is hereby stipulated and agreed between counsel that sixty days from the date of the entry of the final decree herein shall be allowed within which time to perfect such appeals as may be taken to the

appellate courts, and that, during said period, no action shall be taken by any party looking to the execution of said decree as entered.

TAYLOR, SEYMOUR, WEBBER & KING, *Of Counsel for Defendants.*
J. H. CABELL &
W. O. HENDERSON,
Counsel for Complainant.

And afterwards, to-wit, on the 28th day of June A. D. 1904. a petition for appeal was filed in the clerk's office of said court, clothed in the words and figures following, to-wit:

Petition for Appeal.

THE SCOTTISH UNION & NATIONAL INSURANCE COMPANY, Complainant,
vs.
WILLIS G. BOWLAND, L. EWING JONES, ARTHUR I. VORYS, and William S. McKinnon, Defendants.

38 The above named plaintiff, conceiving itself aggrieved by the decree made and entered on the 20th day of June, 1904, in the above entitled cause, does hereby appeal from said order and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors, which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said decree and order were made, duly authenticated, may be sent to the Supreme Court of the United States,

W. O. HENDERSON &
J. HARTWELL CABELL,
Attorneys for Complainant.

Dated this — day of ——, A. D. 1904.

The foregoing appeal is allowed.

—— ——.

Dated this — day of ——, A. D. 1904.

And afterwards, to-wit on the 28th day of June A. D. 1904. an assignment of errors was filed in the clerk's office of said court, clothed in the words and figures following, to-wit:

THE SCOTTISH UNION & NATIONAL INSURANCE COMPANY, Complainant,
vs.
WILLIS G. BOWLAND, L. EWING JONES, ARTHUR I. VORYS, and William S. McKinnon, Defendant-. } 1168.

Assignment of Errors.

The above named plaintiff prays an appeal from the final decree of this court, in the above entitled cause, made and entered on the 20th day of June, 1904, to the Supreme Court of the United States, and assigns for errors:

39 First. Said circuit court erred in sustaining the separate demurrers of the defendants, Willis G. Bowland, as treasurer of Franklin county, Ohio, and L. Ewing Jones as auditor of said Franklin county, to so much and such parts of the bill of complaint in said cause as seek to enjoin and restrain the defendant, Willis G. Bowland as treasurer of said Franklin county from collecting or attempting to collect the said pretended taxes, or any part thereof, alleged in said bill of complaint to have been assessed and entered upon the tax list of said Franklin county, in the name of complainant for the years 1895 to 1902, inclusive, by distraint, under the provisions of section 1095 of the Revised Statutes of Ohio, of said United States bonds as alleged in the bill of complaint, or sufficient of said bonds, to pay said pretended taxes and the costs that have accrued in that behalf and to so much and such parts of said bill of complaint as seek any part of said relief, and in adjudging and deciding that said bill of complaint and such parts thereof as aforesaid do not entitle the plaintiff to the relief prayed for in said bill of complaint, particularly an injunction restraining the defendant, Willis G. Bowland as treasurer of said Franklin county, from collecting or attempting to collect the said pretended taxes or any part thereof, by distraint as aforesaid.

Second. Said circuit court erred in sustaining the separate demurrers of the defendants, Arthur I. Vorys as superintendent of insurance of the State of Ohio, and William S. McKinnon, as treasurer of the State of Ohio, to so much and such parts of the bill of complaint in said cause as seek to enjoin and restrain the defend-

40 ants, Arthur I. Vorys as said superintendent of insurance, and William S. McKinnon as said treasurer of State, from surrendering and delivering to the defendant, Willis G. Bowland as treasurer of said Franklin county, said United States bonds, or sufficient of them, under said alleged threatened distraint of the same, to pay the said pretended taxes and the costs, that have accrued in that behalf, and to so much and such parts of said bill of complaint as seek any part of such relief, and in adjudging and deciding that said bill of complaint and such parts thereof as aforesaid, do not entitle the plaintiff to the relief prayed for, particularly an injunc-

tion restraining the defendants, Arthur I. Vorys as said superintendent of insurance, and said William S. McKinnon as said treasurer of State from delivering or attempting to deliver said United States bonds, or any part thereof, to the said Willis G. Bowland as treasurer of said Franklin county, to satisfy the said pretended taxes or any part thereof.

Third. Said circuit court erred in finding, ordering, adjudging and decreeing that the said pretended taxes as alleged in the bill of complaint which were levied for the years 1895 to 1902, inclusive, were legally levied for each of said years upon said municipal bonds as alleged in the bill of complaint, or that any part of said pretended taxes was legally levied.

Fourth. Said circuit court erred in ordering, adjudging and decreeing that the plaintiff is not entitled to an injunction to enjoin and restrain the defendant, Willis G. Bowland as treasurer of said Franklin county, from collecting or attempting to collect so much of the said pretended taxes as alleged in the said bill of complaint as were levied for the years 1895 to 1902, inclusive, by
41 distraint, under the provisions of said section 1095 of the Revised Statutes of Ohio, of said United States bonds or sufficient of them, or to enjoin and restrain the defendants, Arthur I. Vorys as said superintendent of insurance and William S. McKinnon as said treasurer of State, from surrendering or delivering to said Willis G. Bowland as said treasurer of Franklin county, said United States bonds, or sufficient of them, to pay such of said pretended taxes as were levied for the years 1895 to 1902, inclusive, and the costs that have accrued in that behalf, and in denying the prayer of the bill of complaint in that behalf for want of equity in said bill.

Fifth. Said circuit court erred in rendering judgment against the complainant for the costs of the action.

Sixth. Said circuit court erred in not finding, ordering, adjudging and decreeing that the defendant, Willis G. Bowland as treasurer of said Franklin county, be perpetually enjoined and restrained from collecting or attempting to collect the said pretended taxes as alleged in the bill of complaint, or any part thereof, by distraint of any property of the plaintiff in the State of Ohio other than the said United States bonds as alleged in the bill of complaint or sufficient of them to pay the said pretended taxes.

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY, *Complainant*,
By J. H. CABELL &
W. O. HENDERSON, *Counsel*.

42 And afterwards, to-wit: on the 28th day of June, A. D. 1904, an entry was made upon the journal of said court, clothed in the words and figures following to-wit:

Entry, J. F. P., 26.

And now it is hereby ordered that the appeal of the complainant in the above entitled cause to the Supreme Court of the United States be and is hereby allowed as prayed, upon the complainant giving to the defendants, on or before the 19th day of August, 1904, its appeal bond according to law in the sum of five hundred dollars ($500.00), for costs and damages on appeal. And it is further ordered and adjudged that upon said bond being given and approved, all further proceedings be and they are hereby ordered to be superseded and stayed until the determination of said appeal by the Supreme Court of the United States.

And afterwards, to-wit: on the 28th day of June, A. D. 1904, a petition of appeal was filed in the clerk's office of said court, clothed in the words and figures following to-wit:

Petition for Appeal.

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY, Complainant,
vs.
WILLIS G. BOWLAND, L. EWING JONES, ARTHUR I. VORYS, and William S. McKinnon, Defendants. } No. 1168.

To the judges of the circuit court of the United States for the southern district of Ohio, eastern division:

The above named defendants, Willis G. Bowland, as treasurer and L. Ewing Jones as auditor of Franklin county, Ohio,
43 Arthur I. Vorys as superintendent of insurance and William S. McKinnon as treasurer of the State of Ohio; conceiving themselves aggrieved by the final decree, order and judgment entered in the above entitled cause on the 20th day of June, 1904, each for himself respectively, hereby appeals separately from so much and such part of said final decree or order as overrules said demurrers to so much and such parts of the bill of complaint as seek to enjoin and restrain the defendant Willis G. Bowland as treasurer of Franklin county, Ohio, from collecting or attempting to collect so much of said taxes alleged in the bill of complaint as were levied for the year 1903, by distraint of United States bonds or sufficient of them, and as also seek to enjoin and restrain the defendants Arthur I. Vorys as superintendent of insurance of the State of Ohio, and William S. McKinnon as treasurer of the State of Ohio, from surrendering and delivering to the said defendant Willis G. Bowland, as treasurer of Franklin county, Ohio, said United States bonds or sufficient of them under the alleged threatened distraint of the same to pay the taxes levied for the year 1903; and as orders, adjudges

and decrees that the defendant Willis G. Bowland as treasurer of Franklin county, Ohio, be perpetually enjoined and restrained from collecting or attempting to collect taxes against complainant for the year 1903 as alleged in the bill of complaint, the amount claimed by reason thereof being the sum of $2910.00 together with five per cent. penalty thereon; and as enjoins and restrains the defendants, Arthur I. Vorys, as superintendent of insurance and William S. McKinnon as treasurer of the State of Ohio, from surrendering or delivering to said Willis G. Bowland as treasurer as aforesaid
44 said United States bonds or sufficient of them to pay such taxes as were levied for the year 1903.

The defendants, Willis G. Bowland, and L. Ewing Jones, each hereby further appeals separately from so much and such part of said final decree as overrules the demurrers to so much and such part of said bill of complaint as seek to enjoin and restrain the defendant Willis G. Bowland as treasurer of Franklin county, Ohio, from collecting or attempting to collect the taxes alleged in the bill of complaint, or any part thereof by civil action against the complainant under the provisions of section 2859 of the Revised Statutes of Ohio; and as orders, adjudges and decrees that the defendant Willis G. Bowland as treasurer of Franklin county, Ohio, be perpetually enjoined and restrained from collecting or attempting to collect all or any part of said taxes as alleged in the bill of complaint by civil action against complainant under the provisions of said section 2859 of the Revised Statutes of Ohio.

And these defendants, each prays that this, his appeal to the Supreme Court of the United States, may be allowed and that a transcript of the record of proceedings and papers upon which said final decree, order and judgment was made, duly authenticated, may be sent to said the Supreme Court of the United States of America.

And now, at the time of filing this petition for appeal, Willis G. Bowland, L. Ewing Jones, Arthur I. Vorys and William S. McKinnon, appellants, herewith file an assignment of errors setting up separately and particularly each error asserted and intended to be urged in the Supreme Court of the United States, and your petitioners will ever pray.

WILLIS G. BOWLAND,
L. EWING JONES,
ARTHUR I. VORYS,
WM. S. McKINNON, *Appellants*,
By EDWARD L. TAYLOR, JR.,
AUGUSTUS T. SEYMOUR,
KARL T. WEBBER, &
WILBER E. KING,
Of Solicitors for Petitioners.

45 And afterwards, to-wit: on the 28th day of June A. D. 1904, an assignment of errors was filed in the clerk's office of said court clothed in the words and figures following to wit:

Assignment of Errors.

THE SCOTTISH UNION & NATIONAL INSURANCE CO., Complainant,
vs.
WILLIS G. BOWLAND ET AL., Defendants.
No. 1168.

To the judges of the circuit court of the United States for the southern district of Ohio, eastern division:

The defendants Willis G. Bowland, L. Ewing Jones, Arthur I. Vorys and William S. McKinnon, now come and under rule 35 of the Supreme Court of the United States, file with their petition for an allowance of appeal in the above entitled cause, this, the assignment of errors herein, which errors defendants assert and intend to urge on the hearing of this cause on appeal in the Supreme Court of the United States namely:

(1.) Said court erred in overruling the demurrers of the defendants to so much and such part of the bill of complaint as sought to enjoin and restrain the defendant Willis G. Bowland as treasurer of Franklin county, Ohio, from collecting or attempting to collect such taxes alleged in the bill of complaint as were levied for the year 1903, and as seek to enjoin and restrain the defendants, Arthur I. Vorys as superintendent of insurance and William S. McKinnon as treasurer of the State of Ohio from surrendering and delivering to the said defendant Willis G. Bowland as treasurer of Franklin
46 county, Ohio, United States bonds or sufficient of them to pay said taxes levied for said year 1903.

(2.) Said circuit court erred in overruling the demurrers of the defendants to so much and such part of the bill of complaint as sought to enjoin and restrain the defendant Willis G. Bowland as treasurer of Franklin county, Ohio, from collecting or attempting to collect the taxes as alleged in said bill of complaint by a civil action against complainant under the provisions of section 2859 of the Revised Statutes of Ohio.

(3.) Said circuit court erred in decreeing that the defendant Willis G. Bowland should be perpetually enjoined and restrained from collecting or attempting to collect the taxes levied against complainant for the year 1903; and perpetually enjoining Arthur I. Vorys as superintendent of insurance, and William S. McKinnon as treasurer of the State of Ohio, from delivering to said Willis G. Bowland as treasurer of Franklin county, Ohio, United States bonds or sufficient of them to pay said taxes levied for the year 1903.

(4.) Said circuit court erred in decreeing that Willis G. Bowland as treasurer of Franklin county, Ohio, should be perpetually enjoined and restrained from collecting or attempting to collect said taxes as alleged in the bill of complaint by a personal action against

complainant under and by virtue of the provisions of section 2859 of the Revised Statutes of Ohio.

(5.) Said circuit court erred in not making, rendering and entering a decree in favor of the defendants and against the complainants, overruling each and all of the demurrers of the defendants to the bill of complaint, and dismissing said bill of complaint for want of equity.

EDWARD L. TAYLOR, JR.,
AUGUSTUS T. SEYMOUR,
KARL T. WEBBER, &
WILBUR E. KING,
Of Solicitors for Defendants.

47 And afterwards, to-wit: on the 28th day of June, A. D. 1904, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Entry, J. F. P., 27.

And now it is hereby ordered that the appeal of the defendants, and each thereof, in the above entitled cause to the Supreme Court of the United States be and the same are hereby allowed as prayed, upon the defendants giving to the complainant, on or before the 19th day of August, 1904, their appeal bond according to law in the sum of five hundred dollars ($500.00) for costs and damages on appeal.

And afterwards, to-wit: on the 18 day of July A. D. 1904, a bond was filed in the clerk's office of said court, clothed in the words and figures as follows: to-wit:

Bond.

Know all men by these presents, that we, The Scottish Union and National Insurance Company, as principal, and The American Surety Company of New York, as sureties, are held and firmly bound unto the defendants, Willis G. Bowland, L. Ewing Jones, Arthur I. Vorys and William S. McKinnon, in the full and just sum of five hundred dollars ($500.00) to be paid to the said defendants, Willis G. Bowland, L. Ewing Jones, Arthur I. Vorys and William S. McKinnon, certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fourteenth day of July
48 in the year of our Lord one thousand nine hundred and four.

Whereas, lately at a term of the circuit court of the United States, southern district of Ohio, eastern division, in a suit depending in said court, between The Scottish Union and National Insurance Company as complainant, and Willis G. Bowland, L. Ewing

Jones, Arthur I. Vorys and William S. McKinnon as defendants a decree was rendered against the said plaintiff, The Scottish Union and National Insurance Company, and the said plaintiff The Scottish Union and National Insurance Company having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said defendants, Willis G. Bowland, L. Ewing Jones, Arthur I. Vorys and William S. McKinnon, citing and admonishing them to be and appear at a session of the United States Supreme Court to be holden at the city of Washington, D. C., on the nineteenth day of August next.

Now, the condition of the above obligation is such, that if the said plaintiff, The Scottish Union and National Insurance Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

AMERICAN SURETY COMPANY OF NEW YORK, [SEAL.]
By F. R. SHINN, *Resident Vic- Pres.* [SEAL.]

Attest: W. R. A. HAYS, [SEAL.]
Resident Assistant Secretary. [SEAL.]

Sealed and delivered in presence of
—— ——.

Approved by
A. C. THOMPSON, [SEAL.]
Judge of United States District Court for the Southern District of Ohio, Sitting and Holding United States Circuit Court.

49 THE UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, Eastern Division, }

I, Benjamin R. Cowen, clerk of the circuit court of the United States, within and for the district and division aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above entitled cause as the same appears of record and on file in said court.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at Columbus, Ohio, this 12th day of August, A. D. 1904.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN, *Clerk,*
By ROB'T C. GEORGI,
Deputy Clerk.

50 United States Supreme Court.

UNITED STATES OF AMERICA, *ss*:

To Willis G. Bowland, L. Ewing Jones, Arthur I. Vorys, and William S. McKinnon, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court, to be holden at the city of Washington, on the* 19th day of August next, pursuant to a petition for appeal filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, eastern division, wherein The Scottish Union and National Insurance Company is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant as in the said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 20th day of July, in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States of America the one hundred and twenty-ninth.

A. C. THOMPSON,
Judge of United States District Court for Southern District of Ohio, Sitting and Holding United States Circuit Court.

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*Not exceeding 30 days from the day of signing.

51 [Endorsed:] No. 1168. United States circuit court, southern district of Ohio, eastern division. Citation. Filed Jul- 27 1904 B. R. Cowen, clerk.

We hereby, this 22nd day of July, 1904, accept due personal service of the within citation on behalf of Willis G. Bowland and L. Ewing Jones, appellees.

EDWARD L. TAYLOR, JR.,
AUGUSTUS T. SEYMOUR,
KARL T. WEBBER, &
WILBUR E. KING,
Solicitors for Appellees.

We hereby, this 22nd day of July, 1904, accept due personal service of the within citation on behalf of Arthur I. Vorys, supt. of insurance, and Willam S. McKinnon, treas'r of State, appellees.

By WADE H. ELLIS,
Att'y General of Ohio, &
SMITH W. BENNETT,
Solicitors for Appellees.

52 & 53 *Supplemental Transcript of Record.*

UNITED STATES OF AMERICA,
Southern District of Ohio, Eastern Division, } ss:

At a stated term of the circuit court of the United States, within and for the eastern division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and held at the court rooms, in the city of Columbus, on the first Tuesday of June, being also the seventh day of that month, in the year of our Lord, one thousand nine hundred and four and in the one hundred and twenty eighth year of the Independence of the United States of America.

Present: The Hon. Albert C. Thompson, district judge, sitting and holding circuit court.

Among the proceedings had were the following, towit:

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY, a Corporation, &c., Complainant,
vs.
WILLIS G. BOWLAND, L. EWING JONES, ARTHUR I. VORYS, and William S. McKinnon, Defendants. } No. 1168.

Be it remembered that heretofore towit: on the 4th. day of August, in the year of our Lord, one thousand nine hundred and four, came the defendants, by their solicitors and filed in the clerk's office of said court, their certain bond on appeal in this cause, which said bond is clothed in the words and figures following, towit:

54 *Appeal Bond.*

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY, Complainant,
vs.
WILLIS G. BOWLAND, L. EWING JONES, Arthur I. Vorys, and William S. McKinnon, Defendants. } No. 1168. In Equity. Appeal Bond.

Know all men by these presents, that we, Willis G. Bowland, L. Ewing Jones, Arthur I. Vorys and William S. McKinnon, as principals, and The Bankers Surety Company, as surety, are jointly and severally held and firmly bound unto the above named The Scottish Union and National Insurance Company, its successors or assigns in the sum of five hundred dollars ($500.00) lawful money of the United States of America, to be paid to the said The Scottish Union and National Insurance Company, its successors or assigns,

for which payment well and truly to be made we bind ourselves, our heirs, executors, successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 30th. day of July, in the year of our Lord one thousand nine hundred and four.

The condition of the above obligation is such that whereas Willis G. Bowland, as treasurer of Franklin county, Ohio, L. Ewing Jones as auditor of Franklin county, Arthur I. Vorys, as superintendent of insurance, and William S. McKinnon, as treasurer of the
55 State of Ohio have taken an appeal to the United States Supreme Court to reverse the final decree made and entered by the circuit court of the United States in and for the southern district of Ohio, and eastern division, which decree was made and entered in the above entitled suit on the 20th. day of June, 1904.

Now therefore, the condition of the above obligation is such that if the above named Willis G. Bowland, as treasurer of Franklin county, Ohio, L. Ewing Jones, as auditor of Franklin county, Ohio, Arthur I. Vorys as superintendent of insurance, and William S. McKinnon as treasurer of the State of Ohio, appellants, herein, shall prosecute said appeal to effect and answer all damages and costs, and if they shall fail to make good their plea then this obligation shall be void, otherwise to remain in full force and effect.

WILLIS G. BOWLAND.
L. EWING JONES.
A. I. VORYS, *Supt. of Insurance.*
W. S. McKINNON, *Treas. of State,*
By CHAS. C. GREEN, *Cashier.*
THE BANKERS SURETY CO.,
[SEAL.] Per G. M. KARSHNER, *Att'y in Fact.*

Approved:

By ARTHUR I. VORYS, *Supt. of Ins.*
WM. S. McKINNON,
By WADE H. ELLIS, *Att'y Gen'l.*

Approved:

A. C. THOMPSON,
Judge of United States District Court for Southern District of Ohio, Sitting and Holding United States Circuit Court.

56 UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, Eastern Division, }

I, Benjamin R. Cowen, clerk of the circuit court of the United States, within and for the district and division aforesaid, do hereby certify that the foregoing is a true and complete supplemental transcript of record and proceedings had by and before said court, in the above entitled cause, as the same appears of record and on file in the clerk's office of said court. The foregoing proceedings having been had subsequent to the filing of the original transcript in said case.

Seal of the Circuit Court, South'n Dist. of Ohio.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Columbus, in said district this 24th day of August, A. D. 1904.

B. R. COWEN, *Clerk*,
By C. P. WHITE, *Deputy*.

57 United States Supreme Court.

UNITED STATES OF AMERICA, } ss:
Sixth Judicial Circuit, }

To the Scottish Union and National Insurance Company, a corporation, etc., Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court, to be holden at the city of Washington, D. C., on the * third day of September next, pursuant to a petition for appeal, filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, eastern division, wherein Willis G. Bowland, L. Ewing Jones, Arthur I. Vorys and William S. McKinnon are appellants, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants as in the said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this fourth day of August, in the year of our Lord, one thousand nine hundred and four, and of the Independence of the United States of America the one hundred and twenty ninth.

A. C. THOMPSON,
District Judge of the United States Sitting and Holding Circuit Court, Southern District of Ohio.

* Not exceeding 30 days from the day of signing.

58 [Endorsed:] No. 1168. Citation. Filed Aug. 24 1904 B. R. Cowen, clerk.

AUGUST 24TH, 1904.

Service of the within citation is acknowledged for the Scottish Union and National Insurance Company, and the appearance of W. O. Henderson and J. Hartwell Cabell, solicitors for the appellees, is hereby entered in the Supreme Court of the United States in said cause.

J. HARTWELL CABELL.
WILLIAM O. HENDERSON.

59 [Endorsed:] No. —. United States Supreme Court. Willis G. Bowland. L. Ewing Jones, Arthur I. Vorys and William S. McKinnon, appellants, *vs.* The Scottish Union and National Insurance Company, appellee. Appeal from the circuit court of the United States, within and for the southern district of Ohio, eastern division. Supplemental transcript. Filed —— —, —— ——, clerk. E. L. Taylor, Jr., Columbus, Ohio. A. T. Seymour, Columbus, Ohio. Karl T. Webber, Columbus, Ohio, Wade H. Ellis, Columbus, Ohio for appellants. J. Hartwell Cabell, Cincinnati, O. W. O. Henderson, Columbus, O. for appellee.

Endorsed on cover: File No. 19,460. S. Ohio C. C. U. S. Term No. 360. The Scottish Union & National Insurance Company, appellant, *vs.* Willis G. Bowland, as treasurer, and L. Ewing Jones, as auditor of Franklin county, Ohio; Arthur I. Vorys, as superintendent of insurance, and William S. McKinnon, as treasurer of the State of Ohio. File No. 19,461. Term No. 361. Willis G. Bowland, as treasurer, and L. Ewing Jones, as auditor of Franklin county, Ohio, *et al.*, appellants, *vs.* The Scottish Union and National Insurance Company. Filed August 27th, 1904. File No. 19,460 and 19,461.

UNITED STATES OF AMERICA,
Southern District of Ohio, E. D., } ss:

I, Benjamin R. Cowen clerk of the circuit court of the United States, within and for the district and division aforesaid, do hereby certify that the foregoing, with the corrections, is a true and complete transcript of the original papers and proceeding had by and before said court in the above cause as the same appears of record and on file in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Columbus in said district this 12th day of December, A. D. 1904.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN, *Clerk,*
By C. P. WHITE,
Deputy Clerk.

Supreme Court of the United States, October Term, 1904.

THE SCOTTISH UNION & NATIONAL INSURANCE COMPANY, Appellant,
vs.
WILLIS G. BOWLAND, as Treasurer, etc., ET AL., Appellees. } No. 360.

WILLIS G. BOWLAND, as Treasurer, etc., ET AL., Appellants,
vs.
THE SCOTTISH UNION & NATIONAL INSURANCE COMPANY, Appellee. } No. 361.

Stipulation.

It is hereby stipulated by counsel for the parties in the above entitled cases that the foregoing certified corrected copy is a true and complete transcript of the record in said cases; that such corrected certified copy and transcript may be substituted on the files of said cases in said court for the incorrect and incomplete transcript of the record now on the files of said court; that said cases may be heard in said court on said certified corrected copy and transcript of the record; and that the clerk of said court may cause said certified corrected transcript of the record to be printed for the use of said court.

EDWARD L. TAYLOR, JR.,
AUGUSTUS T. SEYMOUR,
KARL T. WEBBER,
Solicitors for Willis G. Bowland et al.
J. HARTWELL CABELL AND
WILLIAM O. HENDERSON,
Solicitors for Scottish Union & National Ins. Co.

WADE H. ELLIS,
Attorney General of Ohio, Solicitor for Arthur I. Vorys and William S. McKinnon.

[Endorsed:] File No. 19460, &c. Supreme Court, U. S., October term, 1904. Term Nos. 360 & 361. The Scottish Union Nat'l Ins. Co., app'l't, *vs.* W. G. Bowland, as treas'r, &c., and W. G. Bowland, as treas'r, &c., *vs.* The Scottish Union & National Ins. Co. Certified corrected record & stipulation. Filed Dec. 19, 1904.

Supreme Court of the United States.

Office Supreme Court U. S.
FILED
DEC 29 1904
JAMES H. McKENNEY,
Clerk.

OCTOBER TERM, 1904.

Office Supreme Court U. S.
FILED
DEC 29 1904
JAMES H. McKENNEY,
Clerk.

No. 360.

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY,
Appellant,

versus

WILLIS G. BOWLAND, as Treasurer, and L. EWING JONES, as Auditor of Franklin County, Ohio; ARTHUR I. VORYS, as Superintendent of Insurance, and WILLIAM S. McKINNON, as Treasurer of the State of Ohio,
Appellees.

No. 361.

WILLIAM G. BOWLAND, as Treasurer, and L. EWING JONES, as Auditor of Franklin County, Ohio, et al,
Appellants,

versus

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY,
Appellee.

Appeals from the Circuit Court of the United States for the Southern District of Ohio.

Brief for Appellants.

JUDSON HARMON,
W. O. HENDERSON,
HARTWELL CABELL,
For Appellants.

THE COURT INDEX PRESS, Law Printers, 806 Main Street, Cincinnati, Ohio.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY,

Appellant.

No. 360. *versus*

WILLIS G. BOWLAND, as Treasurer, and L. EWING JONES, as Auditor of Franklin County, Ohio; ARTHUR I. VORYS, as Superintendent of Insurance, and WILLIAM S. McKINNON, as Treasurer of the State of Ohio,

Appellees,

WILLIAM G. BOWLAND, as Treasurer, and L. EWING JONES, as Auditor of Franklin County, Ohio, et al,

Appellants,

No. 361. *versus*

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY,

Appellee.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

Brief for Appellants.

The Scottish Union & National Insurance Company filed its bill in the Circuit Court of the United States for the Southern District of Ohio, Eastern Division, to enjoin various state and county officers of Ohio from the levy and collection of taxes on bonds of the complainant deposited as required by law.

The defendants demurred (R., pp. 13 and 16). The court sustained the demurrers in part and overruled them in part, holding that the bonds were taxable and that the tax on them might be collected by distraint, but that no personal judgment could be obtained therefor, and enjoining the prosecution of suits for that purpose as prayed. He also held that the tax for one of the years involved was improperly assessed. From the decree rendered accordingly both parties have appealed.

STATEMENT OF FACTS.

The Scottish Union & National Insurance Company is a corporation organized under the laws of Great Britain, with its home office in Edinburgh, Scotland, and its chief office in the United States, from which it conducts all its business in Ohio, in the city of Hartford, Connecticut.

Under Section 3660 of the Revised Statutes of Ohio, as amended in 1894 (91 Ohio Laws, 40) this company on September 14th, 1894, deposited with the Superintendent of Insurance of the State of Ohio fifty thousand dollars ($50,000), par value, and on November 7th, 1894, an additional fifty thousand dollars ($50,000), par value, of municipal bonds of the county of Lucas, in the state of Ohio.

Section 3660, as amended in 1894, reads as follows:

> "Section 3660. (Certain companies must make deposit.) A company incorporated by or organized under the laws of a foreign government shall deposit with the superintendent of insurance, for the benefit and security of the policy-holders residing in this state, a sum not less than one hundred thousand dollars in stocks or bonds of the United States, or the state of Ohio, or any municipality or county thereof, which shall not be received by the superintendent at a rate above their par value; the stocks and securities so deposited may be exchanged from time to time for other like securities; so long as the company so depositing continues solvent and complies with the laws of this state, it shall be permitted by the superintendent to collect the interest or dividends on such deposits; and for the purpose of

this chapter the capital of any foreign company doing fire insurance business in this state shall be deemed to be the aggregate value of its deposits with the insurance or other departments of this state and of the other states of the United States, for the benefit of policy-holders in this state or in the United States, and its assets and investments in the United States certified according to the provisions of this chapter; but such assets and investments must be held within the United States, and invested in and held by trustees, who must be citizens of the United States, appointed by the board of directors of the company and approved by the insurance commissioner of the state where invested, for the benefit of the policy-holders and creditors in the United States; and the trustees so chosen may take, hold and convey real and personal property for the purpose of the trust, subject to the same restrictions as companies of this state."

The Lucas county bonds so deposited were not ordinary coupon bonds payable to bearer, but were registered under the provisions of Section 2711-20, Rev. Stat. Ohio, in the name of the Superintendent of Insurance, in trust for the benefit and security of the policy-holders of The Scottish Union & National Insurance Company residing in Ohio.

Section 2711-20 reads as follows:

"(2711-20.) Section 1. (Registration of bonds.) Any city, village, county or school district of this state, which has been or hereafter may be authorized to issue bonds, shall, on demand of the owner and holder of any of its coupon bonds heretofore or hereafter issued, issue in lieu thereof registered bonds of such city, village, county or school district; the owner and holder asking for exchange of bonds shall pay a reasonable compensation to cover expense of such exchange, which shall be of the same denomination, in excess of five hundred dollars, as the owner or holder may desire, bear the same rate of interest, and be payable at the same time, both as to interest and principal, as the coupon bonds for which they are exchanged; such coupon bonds, when so exchanged, shall be canceled and filed in the manner provided for bonds redeemed; a book shall be kept in each of the offices of the auditor and treasurer of any such city, clerk and treasurer of any such village, auditor and treasurer of any such county, and clerk of

the board of education of any such school district, in which shall be entered the date, number, series, denomination, and owner of such registered bonds, and the number and series of the coupon bond for which it was exchanged; the interest and principal of such registered bonds shall, when due, be paid only to the order of the person, corporation or firm who appears by such books to be the owner thereof; and such registered bonds may be transferred on such books by the owner in person, or by a person authorized so to do by power of attorney, duly executed; and in such case the power of attorney shall be filed and carefully preserved in the office of the treasurer of any such city, village, county or school district, that the exchange and registering of bonds required by this act shall be transacted by the mayor and clerk of any such city or village, the auditor and treasurer of any such county, and the president and clerk of the board of education of any such school district, at their business offices, and they shall keep a registry for that purpose; that the exchange and registering of bonds required by this act shall be transacted by the trustees of the sinking fund of such city at their business office, where a registry shall be kept for that purpose; * * * ".

The bonds so deposited and registered were, as is by law directed, delivered by the Superintendent of Insurance to the State Treasurer for safe keeping, and remained in the treasurer's office in Columbus, Franklin county, Ohio, from the time of their original deposit until they were finally withdrawn on April 2nd, 1903.

The Scottish Union & National Insurance Company has neither office nor managing agency in Ohio, and none of its general officers reside in the state. It conducts its business through local agents appointed for the sole purpose of soliciting and procuring insurance, and issuing policies. These agents report directly to the office of the company in Hartford, Connecticut.

No agent of the Company residing or doing business in Ohio had management or control in any way of the bonds deposited, and the interest on the bonds while on deposit was paid as it accrued directly to the Hartford office.

In September, 1900, a notice was served on one of the local agents of The Scottish Union & National Insurance Company, addressed to the company, and notifying it to appear before the Auditor of Franklin County and show cause why the said municipal bonds then on deposit in said county with the Treasurer of State should not be placed against it on the tax duplicate of that county and taxes collected thereon for the years 1895 to 1900, inclusive. Thereafter the said Auditor made the following entry upon the tax duplicate of Franklin County:

Owner's Name.	Year.	Value.	Rate.	Tax by Levy.	Special Tax.	Grand Total.
Scottish Union	1895	$100,000	2.70	$2,700		
and National	1896	$100,000	2.70	$2 700		
Insurance Co.	1897	$100,000	2.70	$2,700		
	1898	$100,000	2.75	$2,750		
	1899	$100 000	2 75	$2,750		
	1900	$100,000	2.75	$2,750	$817.50	$16,350. 817.50

On or about November 15th, 1900, the treasurer of said Franklin county brought a civil action against the company, praying judgment against it for the taxes so assessed with respect to said municipal bonds for the years 1895 to 1900, inclusive. This action, which was commenced in the Common Pleas Court of Franklin County, Ohio, is still pending.

On December 4th, 1903, notice was again served upon one of the local agents, addressed to the company, and notifying it to appear before the auditor of Franklin county and show cause why the said municipal bonds then on deposit in said county with the Treasurer of State should not be placed against it on the tax duplicate of that county and taxes collected thereon for the years 1901, 1902 and 1903. Thereafter the said auditor made the following entry upon the tax duplicate of Franklin county.

Owner's Name.	Year.	Value.	Rate.	Tax by Levy.	Special Tax.	Grand Total.
Scottish Union	1901	$100,000	2.85	$2,850		
and National	1902	$100,000	2.75	$2,750		
Insurance Co.	1903	$ 97,000	3.00	$2,910	$425.50	$8,510.
						425.50

On April 2nd, 1903, upon an application for leave to substitute theretofore made by the Scottish Union & National Insurance Company, the Superintendent of Insurance accepted from said company one hundred thousand dollars ($100,000) in bonds of the United States as a deposit under the provisions of Section 3660, and sent to the company at its office in Hartford, the municipal bonds whch had been deposited with him until that time.

On April 2d, 1904, the treasurer of Franklin County procured a warrant of distraint and under such warrant made demand upon the Superintendent of Insurance and the State Treasurer, for the United States securities belonging to the company, then on deposit with him, with the avowed intent of seizing and selling the same to pay the taxes which had been assessed against the said company with respect to the municipal bonds on deposit from 1895 until April 2d, 1903.

The bill filed April 20th, 1904, set out the facts as above stated, and prayed as follows:

> "Wherefore, complainant prays that the said defendant, Bowland, as treasurer of Franklin county, Ohio, be temporarily restrained from collecting, or attempting to collect, any of said pretended taxes against complainant personally; that said defendant, Bowland, be restrained from collecting, or attempting to collect, the said pretended taxes, or any portion of them, by distraint, against either said bonds of the United States so deposited as aforesaid, or any personal property of complainant which may now or hereafter be situate in the said county of Franklin, or the state of Ohio; that said defendants, Arthur I. Vorys, as superintendent of insurance, and William S. McKinnon, as treasurer of the state of Ohio, be temporarily restrained from delivering, or attempting to deliver, said bonds of the United States on deposit with them or any part of

same, to the said Willis G. Bowland, as said treasurer as aforesaid; and that, upon final hearing herein, said injunctions be made perpetual; and for such other and proper relief as equity and good conscience may require."

Upon argument the court below decided:

First—That the municipal bonds on deposit in Ohio were tangible personal property and taxed under the laws of the state.

Second—That the state had no power to make the taxes with respect to such bonds a personal charge upon a non-resident owner and that, therefore, the civil action brought to enforce payment of the taxes so assessed and pending in the Common Pleas Court of Franklin County against complainant should be restrained.

Third—That the United States securities deposited in lieu of the municipal securities in April, 1903, were liable for the taxes assessed against complainant with respect to the municipal securities, and the court therefore refused to enjoin the execution of the distress warrant.

Fourth—That the taxes assessed against complainant with respect to the municipal bonds for the year 1903 were improperly assessed and the court enjoined collection of those taxes.

The company appeals from the decree of the court below so far as it holds the municipal bonds to have been taxable under the laws of Ohio, and that the United States securities deposited in lieu of such bonds could be distrained for the collection of taxes levied with respect to the municipal bonds.

The treasurer and auditor of Franklin county cross-appeal from so much of the court's decree as denies the right of the State to institute a civil action in its own courts against a non-resident for the collection of taxes assessed against such non-resident with respect to property belonging to it and found in the state, and from so much of the decree as restrained the said officials from attempting to collect the taxes assessed against the said municipal bonds for the vear 1903.

ARGUMENT.

The discussion of the case presented by the Record naturally divides itself into a consideration of four questions:

First—Whether the municipal bonds deposited with the Superintendent of Insurance by foreign insurance companies, under the requirements of Section 3660, Rev. Stat. Ohio, are taxed by the laws of Ohio.

Second—Whether taxes assessed with respect to such deposits belonging to non-residents can be collected by a civil action instituted against the non-resident owner personally and independent of any proceedings *in rem* against property belonging to such non-resident.

Third—The municipal bonds formerly on deposit having been lawfully withdrawn from the State by the consent of its officers, whether the taxes levied with respect to them can now be collected by distraint or other proceeding *in rem* directed against the United States securities now on deposit and belonging to the same non-resident owner.

Fourth—Whether the taxes with respect to the bonds for the year 1903, the bonds having been removed from the state on the 2d day of April of that year, eleven days prior to the date upon which their return was required by law, if required at all, were lawfully assessed.

The court below held for the defendants on the first and third of these questions and for the complainant on the second and fourth.

I.

The Municipal Bonds Deposited With the Superintendent of Insurance by Foreign Insurance Companies Under the Requirements of Section 3660, Revised Statutes, Ohio, are not Taxed by the Laws of Ohio.

The precise question embodied in this proposition has been adjudicated by the U. S. Circuit Court of Appeals for the Sixth

Circuit, in the case of another company, *Western Assurance Company of Toronto* v. *Halliday*, 126 Fed. Rep., 257. The decision was adverse to the position of appellant in these cases. An argument of the proposition necessarily involves an analysis of the grounds upon which that decision was placed, since the same constitutional and statutory provisions having been there construed against us, the decision, if correct, is conclusive upon this point.

Much of Judge Lurton's opinion is devoted to a discussion of the *power* of the state to tax municipal securities under the circumstances of these deposits. The soundness of his conclusions in this respect is not questioned. We do not contend that the laws of the state could not have taxed bonds so deposited regarded either as tangible property, or as choses in action the paper evidences of which are within the state. We concede that *State Tax an Foreign Held Bonds case*, 15 Wall., 300, *Walker* v. *Jack*, 31 C. C. A., 462, *New Orleans* v. *Stempel*, 175 U. S., 309, *Blackstone* v. *Miller*, 188 U. S., 189, and other authorities are decisive, and that a state has the right to class municipal bonds as tangible personal property, and the power to tax them when found in the state. But the power of the state to tax, and the extent to which it has exercised that power by constitutional and statutory provisions are two different things; and we do contend that the State of Ohio by her constitution and statutes has elected to treat such securities, not as tangible property, but as a species of intangible property, depending for taxability, not upon the situs of the paper, but upon the situs of some person in Ohio sustaining a specified relation to the bonds; that as the constitution and statutes have been construed by the Supreme Court of Ohio, these requirements do not here exist; and that the decision in the Halliday case ignores the plain language of the laws and the decisions of that court which should be final upon the question.

The constitutional provision bearing upon the question is as follows:

Article XII, Section 2, of the Ohio Constitution of 1851,

> "Section 2. (Taxation by uniform rule.) Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all the real and personal property, according to its true value in money; * * *"

This section of the constitution does not execute itself. The law of Ohio, as stated by Thurman, J., in *Lamb* v. *Lane*, 4 O. S., p. 167, is substantially that where the constitution prescribes the method of procedure that method must be pursued, and that in such case the constitution does not execute itself, but proper provisions must be made *by law*. To the same effect is *Chisholm* v. *Shields, Treasurer*, 67 O. S., 374, where the learned Chief Justice says (p. 377):

> "Section 2 of Article XII of the Constitution *imposes upon the General Assembly the duty of passing laws* taxing all property at its true value in money, with certain named exceptions."

The statutes which affect this section of the Constitution in so far as they bear upon the discussion, are as follows:

Section 2731, Revised Statutes of Ohio, reads as follows:

> "Section 2731. (Property subject to taxation * * *). All property whether real or personal in this state, and whether belonging to individuals or corporations; and all moneys, credits, investments in bonds, stocks, or otherwise of persons residing in this state, shall be subject to taxation, except only such as may be expressly exempted therefrom; and such property, moneys, credits, and investments shall be entered on the list of taxable property as prescribed in this title; * * *"

Section 2734, Revised Statutes of Ohio, reads as follows:

> "Section 2734. (Who shall list personal property.) Every person of full age and sound mind shall list the personal property of which he is the owner, and all moneys in his possession, all moneys invested, loaned or otherwise controlled by him, as agent or attorney, or on account of any other person or persons,

company or corporation whatsoever, and all moneys deposited subject to his order, check, or draft, and all credits due or owing from any person or persons, body corporate or politic, whether in or out of such county; * * * the property of every ward shall be listed by his guardian, * * *; of every person for whose benefit property is held in trust, by the trustees; * * * of every company, firm, or corporation by the president or principal accounting officer, partner or agent thereof; * * *"

Section 2735, Revised Statutes of Ohio, reads as follows:

Section 2735. (Where personal property shall be listed.) Every person shall be required to list property on behalf of others shall list the same in the same township, city, or village in which he would be required to list it if such property were his own; but he shall list it separately from his own, specifying in each case the name of the person, estate, company or corporation, to whom it belongs; * * *"

Section 2744, Revised Statutes of Ohio, reads as follows:

"Section 2744. (Corporations generally; their returns.) The president, secretary and principal accounting officer of every * * * insurance company, * * * or other joint stock company except banking or other corporations whose taxation is specifically provided for, for whatever purpose they may have been created, whether incorporated by any law of this state or not, shall list for taxation, verified by the oath of the person so listing, all the personal property which shall be held to include all such real estate as is necessary to the daily operations of the company, moneys and credits of such company or corporation within the state, at the actual value in money, in manner following; in all cases returns shall be made to the several auditors of the respective counties where such property may be situated, together with a statement of the amount of said property which is situated in each township, village, city or ward therein. The value of all movable property shall be added to the stationary and fixed property and real estate, and apportioned to such wards, cities, villages, or townships, pro rata, in proportion to the value of the real estate, and fixed property in said ward, city, village or township, and all property so listed shall be subject to and pay the same

taxes as other property listed in such ward, city, village or township. * * * Provided, that nothing in this section shall be so construed as to tax any stock or interest in any joint stock company held by the state."

Section 2745, Revised Statutes of Ohio, before the amendment of April 29, 1902, reads as follows:

"Section 2745. (Returns by foreign insurance companies.) Every agency of an insurance company incorporated by the authority of any other state or government, shall return to the auditor of each county in which such company does business, or from which it collects premiums, on or before the first day of May, annually, the amount of the gross premium receipts of such agency for the previous calendar year in such counties; provided, however, that in the case of regular companies, wherein policy holders participate in the surplus and earnings of the company, dividends or surplus from previous payments allowed and used in the payment of current premiums, cancellation or surrender values and commissions paid to the citizens of this state during the same period, for which receipts are reported, shall be deducted from such gross receipts, and the net amount after such deduction shall be the basis of taxation for such companies in the counties, which shall be entered upon the tax list of the proper county and shall be subject to the same rate of taxation for all purposes that other personal property is subject to at the place where located; * * * And it shall be the duty of the Superintendent of Insurance, in the month of December, annually, to charge and collect from all such companies, such a sum as, added to the sum paid to the county treasurers, will produce an amount equal to two and one-half per cent. on the gross premium receipts of such companies, as shown by their annual statements under oath to the insurance department; * * * All taxes collected under the provisions of this section by the Superintendent of Insurance shall be paid by him, upon the warrant of the auditor, into the general revenue fund of the state."

Section 2746, Revised Statutes of Ohio, reads as follows:

"Section 2746. (In whose name property to be listed; but stock in companies which make return of capital not to be listed by shareholder.) Personal property of every description, moneys and credits, in-

vestments in bonds, stocks, joint stock companies, or otherwise shall be listed in the name of the person who was the owner thereof on the day preceding the second Monday of April in each year; but no person shall be required to list for taxation any share or shares of the capital stock of any company, the capital stock of which is taxed in the name of such company."

Article XII, Section 2, of the Ohio Constitution quoted above, enumerates the subjects of taxation, They are "moneys," "credits," "investments in bonds, stocks, joint stock companies or otherwise," and also "real property," and "personal property."

Section 2731, *supra*, which is the declaratory enactment of this constitutional provision specifying what property shall be taxed, repeats the classes there enumerated, with the greater amplification to be expected in a statute by expressing what was manifestly understood in the Constitution, viz., that the taxing power was to be exercised only on subjects within the state. The statute declares as subjects of taxation all real and personal property *in the state*, and all moneys, credits, investment in bonds, stocks or otherwise, *of persons residing in the state.*

Section 2730, Revised Statutes of Ohio, more particularly defines the general subjects mentioned in Section 2731, defining investments in bonds as follows:

> "Section 2730. * * * The terms, 'investment in bonds' shall be held to mean and include all moneys in bonds, or certificates of indebtedness, or other evidence of indebtedness of whatever kind, whether issued by incorporated or unincorporated companies, *towns*, cities, villages, * * * *held by persons residing in this state, whether for themselves or others;* * * * "

It is apparent that taking this enumeration in the ordinary legal sense, the same thing might be regarded indifferently as a "credit," an "investment in bonds" or "personal property." The proposition of law under discussion depends for solution upon the answer to the question whether by the constitution and the language of Section 2731 it was intended that a given piece of property, say a bond, could be taxed indiscriminately

as either a "credit," an "investment in bonds," or "personal property," or that each kind of property so enumerated should be taxed under its appropriate class, or not at all.

The decision of Judge Lurton in the Halliday case (*supra*) adopts the first alternative.

He said (p. 261):

> "The claim of the insurance company is in effect that investments in bonds and stocks, although actually having a situs in Ohio, are not subject to taxation as 'personal property' 'in this state' under the broad language of the first clause of Section 2731, and are only taxable, being an investment in bonds, when they are the bonds or stock 'of persons residing therein' within the meaning of the second clause of the same section. This amounts to a claim of exemption in favor of every form of personal property which may come under the classification of 'moneys, credits, investments in bonds, stocks, joint stock companies or otherwise' although having an actual situs in this state, unless they are the money, credits, bonds or stock 'of persons residing in this state.' In view of the constitutional requirement that laws shall be passed subjecting all real and personal property to taxation, it would seem more rational to construe the first clause of this section as subjecting every species of real and personal property to taxation if found 'in the state' and the enumerated kinds of personal property set out in the last clause without regard to any actual situs when owned by a 'person residing in the state.'"

This interpretation both of the constitutional provision and of the statute is in direct conflict with the decisions of the Supreme Court of Ohio. Instead of giving this broad meaning to "personal property" making it include "every species of personal property," Thurman, J., in construing this section of the Constitution in *Exchange Bank* v. *Hines* (3 Ohio St., 1, 39), says:

> "Although 'personal property' in legal signification, includes moneys and credits, it is apparent that wherever it is employed in this section it is used in a limited sense and does not include them."

And therefore, the court proceeded to say, the $200.00 worth of "personal property" of each citizen, declared exempt from execution or attachment by this same section, did not include credits or money, but was confined to "personal property" in this restricted sense.

In *Worthington* v. *Sebastian* (25 Ohio St., 1, 8), Welch, J., in delivering the opinion of the court, says:

> "Section 2, Article XII, of the State Constitution merely names the subjects of taxation and makes no limitation as to their *situs* or ownership. The subjects of taxation so named are 'moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, and also real and personal property.' It declares that 'all' these subjects so named (except certain exempted items, which have no relation to the present case), shall be taxed by a uniform rule. * * Our system of an *ad valorem* taxation has uniformly proceeded upon the theory that *tangible* property is to be taxed according to the law of the place where it is situated, irrespective of the residence of its owner, while with *equal* uniformity it has proceeded upon the theory that 'credits,' 'investments in bonds,' 'stocks,' etc., are taxable according to the laws of the place where their owners or holders reside."

This language is conclusive, not only as to the *mutual exclusiveness* of the enumerated subject of taxation, but also as to the election of Ohio to treat "investments in bonds," for the purposes of taxation not as *tangible* but as *intangible* property, incapable of a situs apart from its owner or holder.

In *Myers* v. *Seaberger* (45 Ohio St., 232 at 234), the court say:

> "The subjects of taxation are enumerated in Section 2731 of the Revised Statutes. The language is as follows: 'All property whether real or personal in this state. * * * The first clause evidently embraces all *tangible* property, real or personal, situated in this state, irrespective of the residence of the owner, and the second clause embraces all *intangible* property of persons residing in this state, irrespective of where the sub-

> ject of the property may be situated. So that it seems clear that the *credits* of persons *not* residing in this state are not the subject of taxation by its authorities."

Yet credits as well as municipal or railroad bonds would fall within Judge Lurton's definition of personal property under his construction of the same section and could be taxed whenever the paper evidence is found in Ohio, although neither held or owned by a person in the state.

In *Brown* v. *Noble* (42 Ohio St., 405), the court say (p. 409):

> "* * * It seems clear to us that the situs of moneys, credits and investments for the purpose of taxation, is the residence of the person whose duty it is to list the same. * * *"

In *Sommers* v. *Boyd* (48 Ohio St., 648), the question was where certain credits should be returned for taxation, whether at the residence of the guardian who still held the personalty after the death of his ward, or the residence of the administrator of the ward's estate who did not have the actual possession of the personalty and who resided in another county. In deciding that they were to be returned not at the place where the credits actually were but in the county where the administrator resided, the court cite *Brown* v. *Noble* (*supra*) and hold that the domicile of the administrator furnishes the taxing situs of the credits. Referring to the fact that the credits were actually in possession of the guardian, the court say (p. 663):

> "The credits were not there, in the possession of any one clothed with the authority or charged with the duty of listing them; and the mere presence there of the evidences of the indebtedness, did not so fix the *situs* of the credits, as to require them, under the last clause of Section 2735, to be there listed for taxation."

In *Payne* v. *Watterson* (37 Ohio St., 121), these provisions of the constitution and statutes again came before the court. McIlvaine, J., delivering the opinion, said (p. 123):

"The subjects of taxation as enumerated in Section 2731 are 'all property, whether real or personal, and whether belonging to individuals or corporations; and all moneys, credits, investments in bonds, stocks or otherwise, of persons residing in this state.' 'Credits' are specifically named as a subject of taxation and 'investments in bonds' are also specifically named as another; and in Section 2730 the latter is defined as follows: 'the terms "investments in bonds" shall be held to mean and include all moneys in bonds, or certificates of indebtedness or other evidences of indebtedness of whatever kind, whether issued by incorporated or unincorporated companies, *towns, cities, villages, townships, counties, states* or other incorporations, or by the United States, *held by persons residing in this state, whether for* themselves or others.' Now by the common meaning of the words, the plaintiff's bonds are as clearly within the definition of 'investments in bonds,' here given as within the definition of 'credits' as above quoted; and if everything within the definition of 'credits' were to be taxed as credits and everything within the definition of 'investments in bonds' were to be taxed as investments in bonds, it would assuredly follow that the bonds of the plaintiff would be subject to double taxation. And again, this same section provides that 'the term "money" or "moneys" shall be held to mean and include any surplus or undivided profits held by societies for savings, or banks having no capital stock, gold and silver coin, bank notes of solvent banks, in actual possession, and every deposit which the person owning, holding in trust, or having the beneficial interest therein, is entitled to withdraw in money on demand'; while it is provided in Section 2737, that 'every person required to list property for taxation shall set forth in his statement, separately and distinctly, among other things, as follows: 'thirteenth, moneys on hand or on deposit, subject to order; fourteenth, the amount of credits as hereinbefore defined; fifteenth, the amount of all moneys invested in bonds, stocks, joint stock companies, annuities or otherwise.'

"Now, I shall be content to assume, at least until it shall be controverted, that the Legislature, by these provisions and definitions, *did not* intend to impose double or triple taxation; hence, it must be assumed, also, that the Legislature did not intend to embrace within the meaning of one of these terms property or things that were intended to be included in another. Therefore, it only remains to be determined whether

> the plaintiff's bonds must be included within the term 'investments in bonds' or within the term 'credits.' We think that they were the subject of taxation as 'investments in bonds,' which are defined by the statute to mean moneys in bonds. This conclusion is in accordance with the first and only meaning of the words. If these were not 'investments in bonds,' we can not conceive of anything that would be an investment in bonds. If these are not investments in bonds, these words in the statute are meaningless."

To reconcile the Halliday case with these decisions of the Supreme Court is impossible. Judge Lurton declares it to be permissible, for the purpose of taxation, to consider bonds either as tangible or intangible property. If actually in the state they may be treated as tangible and taxed as such, although not *owned* or *held* by any one in the state; if actually out of the state, but owned or controlled by some one in the state, then they may be treated and taxed as *intangible* property, and reached through their control or ownership.

To subject this conclusion to the test suggested by Judge McIlvaine in *Payne* v. *Watterson* accentuates its fallacy. Neither clause in the enumeration in Section 2731 of subjects of taxation has precedence over the others; they stand side by side in the same sentence. If several are taken to include the same property, the taxes may be assessed under any. Where the situs of the bonds happen to be the situs of the owner, double taxation would not probably result, but where the owner resides in one county of the state and the bonds are in another, either or both auditors may, in fact *must* tax the property, the one as tangible property situated in his county, and the other as intangible property owned by a person residing in his county.

In fact such an attempt was recently made and the Supreme Court of Ohio has again placed itself upon record as declaring investments in municipal bonds, for purposes of taxation, to be intangible property and incapable of a taxing situs in Ohio apart from an owner or holder.

The facts were these: A debenture company had deposited municipal bonds with the State Treasurer of Ohio for the security of its bond-holders under a statutory requirement similar to Section 3660. The company's home office, from which it managed its entire business was in Cincinnati, Hamilton County; the bonds were in the State Treasury in Columbus, Franklin County. It was therefore admitted that the bonds were liable for taxation in Ohio, the only question being where they should be returned for taxation. The Auditor of Hamilton County placed the bonds upon his duplicate on the theory that they were intangible property and their situs could only be at the home office of the company. The Auditor of Franklin County placed the bonds upon his duplicate upon the theory that they were either tangible property and the situs for taxation was the location of the bonds themselves, or else intangible property held by the State Treasurer as trustee. The case was first heard before a referee, who held, following the above and other decisions of the Supreme Court of Ohio, that the bonds were not *tangible* property. He further decided that they were not properly assessed against the State Treasurer, as a trustee holding the bonds in Franklin County, but should be taxed as intangible property in Hamilton County where the owner resided. This finding was affirmed by the Common Pleas Court and by the State Circuit Court, whose opinion is reported in *Sims, Treas.*, v. *Best* (1 Ohio Circuit Reports—New Series, 41; 25 Ohio Cir. Court Rep., 149). This decision of the Circuit Court was appealed from by the taxing officers of Franklin County and the case was pending in the Supreme Court of Ohio under the style *Heintz et al, Receivers*, v. *Cameron et al*, at the time the Halliday case was argued and decided by the United States Circuit Court of Appeals. After the Circuit Court of Appeals had decided the Halliday case, holding municipal bonds to be taxable as tangible property, the Supreme Court of Ohio affirmed the above decision of the State Circuit

Court without report (70 Ohio St., 491). The decision of the State Circuit Court, therefore, becomes that of the Supreme Court of Ohio. The State Circuit Court in that case says:

> "It is claimed that these bonds should be returned for taxation by the Treasurer of the State in the county where the safe of the Treasurer of the State is, and where these bonds are required to be kept, which is in Franklin County. On the other hand it is claimed that that the bonds should pay taxes in Hamilton County, in which county the principal office and main place of business is located.
>
> "The Court of Common Pleas held that the bonds were taxable in Hamilton County. We think the judgment of the court was right as to this.
>
> "We are clearly of the opinion that the bonds required by law to be deposited with the Treasurer of State, do not in any sense constitute him a trustee or owner in any sense. He has no right or control over these bonds, and not a particle of interest in them either as to principal or interest except as an officer of the state and as the custodian of them. The bonds are the property of the corporation, just as much after they are deposited with the State Treasurer as they were before. * * *
>
> "The bonds remained at all times the property of the company, and must be listed by it for taxation under Section 2735, R. S., at the place where the owner resides. The owner, in this case, is the corporation, and its residence for taxation is Cincinnati, Hamilton County, Ohio (37 O. S., 450).

The learned judge in the Halliday case, after reviewing the several sections of Ohio tax laws, further says (p. 262):

> "When the several sections are read and construed together it is obvious that the intent and purpose of the legislation is to subject to taxation every form of personal property having situs in this state, including such forms of personal property as money, credits, bonds, and stocks, *provided* only these latter are held or owned by a person residing in the state. If they are owned by a person residing in Ohio, they are subjected to taxation without regard to the place of their deposit or lodgment, but, if not owned by a person residing in the state, their taxability is made to de-

> pend upon their being 'held' in the state by some one residing therein, who holds and controls same for the non-resident owner as agent or otherwise."

We believe this is an accurate statement of Ohio tax law, entirely consistent with the utterances of the Supreme Court of the state. But the sentence that immediately follows indicates very plainly that the learned judge did not analyze the meaning of his language:

> "In the one case Ohio exercises its power to tax by reason of the presence of the property within the state and in the other by virtue of the domicile of the owner and the saying *mobilia sequuntur personam.*"

The two contrasted clauses in the sentence preceding this are: The one, taxation of moneys, credits, investments in bonds, etc., when *owned* by a person residing in the state, irrespective of the location of the paper evidences, and solely depending for taxing situs upon the residence of the owner in said state; the other, the taxation of moneys, credits, investments in bonds, etc., when *held* by a person residing in the state, equally irrespective of the location of the paper evidence and equally dependent for taxing situs upon the residence of the holder in the state. In neither case is a tax levied "by reason of the presence of the property," and especially is this true of property *held* within the state, as otherwise, a non-resident's property of this description would entirely escape taxation if the paper evidence thereof should be sent out of the state by the resident managing agent of the non-resident owner, although his control over the same continued in full force, a device which has been tried and held futile.

In the Halliday case, referring to the claim of appellant in that case, which is our claim here, that the subjects of taxation enumerated in the Constitution and statutes are exclusive and not over-lapping, the learned Judge says (p. 261):

> "This amounts to a claim of exemption in favor of every form of personal property which may come

> under the classification of 'moneys, credits, investment in bonds, stocks, joint stock companies or otherwise,' although having an actual situs in this state."

This statement of our position is inaccurate since it assumes the presence in the state of the paper evidences of such intangible property as equivalent to an actual situs of the property. What was urged in the Halliday case, and what we urge here, is that, irrespective of the actual location of the paper evidences, there could, under Ohio law as it now exists, be no taxing situs in Ohio of this class of property apart from a resident owner or holder. Waiving this criticism, the statement by Judge Lurton of our position is entirely in accord with the statement of the law of Ohio by her Supreme Court. Moneys, credits, investments in bonds, stocks, etc., are all qualified in 2731 by the words "of persons residing in this state." In *Grant* v. *Jones* (39 Ohio St., 506), the taxation of "credits" was at issue, which, of course, involved exactly the same question as the taxation of "investments in bonds." The syllabus (which under the rule of that court is the language of the whole court) reads:

> "Credits owned by a non-resident of this state *are not* taxable *here*, unless they are *held* within the state by a guardian, trustee or agent of the owner *by whom they must be returned for taxation.*"

In the opinion in that case the unimportance of the location of the paper evidence of a credit in determining the question whether it is taxed under the law of Ohio, and the necessity of a resident owner or holder to give the credit a taxing situs, are further accentuated. The court say (p. 514):

> "Whenever the person holding such choses in action resides in Ohio, he must list for taxation such credits, whether he holds them as owner, guardian, trustee or agent. If they are held within the state in either capacity, they are then within the jurisdiction of the state for the purposes of taxation. If they are not so

held but are owned and held by non-residents, they are not subject to taxation."

It was insisted by counsel for the defendant below that even if the bonds are not taxed under Sections 2730 and 2731, *supra*, they are taxed under Sections 2744 and 2746, *supra*, Revised Statutes of Ohio. Their contention, it may be remarked, is in accord with the utterances of Judge Lurton in the Halliday case (*ante*).

The sections referred to in so far as they concern the discussion, read as follows:

> "Section 2744. (Corporations generally; their returns.) The president, secretary and principal accounting officer of every * * * insurance company, * * * or other joint stock company, except banking or other corporations whose taxation is specifically provided for, for whatever purpose they may have been created, whether incorporated by any law of this state or not, shall list for taxation, verified by the oath of the persons so listing, all the personal property which shall be held to include all such real estate as is necessary to the daily operations of the company, moneys and credits of such company or corporation within the state, at the actual value in money, in manner following: in all cases returns shall be made to the several auditors of the respective counties where such property may be situated, together with a statement of the amount of said property which is situated in each township, village, city or ward therein. The value of all movable property shall be added to the stationary and fixed property and real estate, and apportioned to such wards, cities, villages, or townships, pro rata, in proportion to the value of the real estate and fixed property in said ward, city, village, or township, and all property so listed shall be subject to and pay the same taxes as other property listed in such ward, city, village, or township. * * * Provided, that nothing in this section shall be so construed as to tax any stock or interest in any joint stock company held by the state."
>
> "Section 2746. (In whose name property to be listed; but stock in companies which make return of capital not to be listed by shareholder.) Personal property of every description, moneys and credits, investments in bonds, stocks, joint stock companies or

> otherwise, shall be listed in the name of the person who was the owner thereof on the day preceding the second Monday of April in each year; but no person shall be required to list for taxation any share or shares of the capital stock of any company, the capital stock of which is taxed in the name of such company."

Section 2731 is found in the first chapter of the title of the Revised Statutes of Ohio devoted to the subject of Taxation. The subject of the chapter is "Definitions, and property to be taxed." Sections 2744 and 2746 are to be found in the second chapter of the same title, the subject of which is "Listing personal property."

The Supreme Court of the state in *Chisholm* v. *Shields, Treasurer* (67 Ohio St., 374-377), describes Section 2731 as a mere "declaratory section," not sufficient by itself to tax any of the classes of property enumerated therein. The following Sections (those contained in Chapter 2) "carry this declaratory section into execution, and prescribe the manner in which taxation is to be imposed upon property therein specified, and property not so specified in any section is not taxed."

The sections of Chapter 2 show, as is well known, that the system of taxation of personal property in Ohio involves in every instance its return by some *person*. Taxes are not charged against the property itself, but against the person whose duty it is to return it. To put it another way, in no case is personal property taxed directly, but some person or corporation is taxed with respect of property owned, or held for others in some representative capacity. No machinery is provided for placing upon the tax duplicate personal property, either tangible or intangible, except as against some person, and the auditor's right to enforce taxes upon property evading taxation are confined to the correction of the returns made by the persons whose duty it was to return the property for taxation, by inserting in those returns the property which should have been included therein (Rev. Stat. Ohio, Section 2781*a*).

The sections contained in Chapter 2 are not intended to enlarge the scope of Section 2731 by adding new classes of property to those declared to be taxed in that section. They merely provide, when, where, how and by whom property declared taxed by Section 2731 shall be returned for taxation. For the purpose of facilitating returns and reaching property broad rules are laid down and in some instances returns of "personal property" are required to contain real estate, etc., as in case of railroads. But these rules are all for the regulation of returns. The only property taxed is the property enumerated in Section 2731, in the light of which the sections of Chapter 2 must be read.

For instance, in Section 2744, which provides for returns for taxation of corporations, their officers are required to list the personal property of the corporation "which shall be held to include all moneys and credits of such company or corporation within the state." The meaning of the word "credits" as here used is clearly the same as its meaning in Sections 2730 and 2731. The "credits" must be in the state in the sense that they are owned or controlled by some person or corporation in the state; otherwise the state would be applying to its corporations a different rule of taxation from that applied to other citizens, and such construction would be in direct conflict with Section 4 of Article XIII, of the Ohio Constitution, which provides:

> "The property of corporations, now existing or hereafter created, shall forever be subject to taxation, *the same as property of individuals.*"

The construction of Section 2744 applied by Judge Lurton ignores this clause of the Constitution entirely. The property of individuals which shall be taxed is enumerated in Section 2731, and the duty of returning such property for taxation both as to individuals and corporations is contained in Section 2734. The learned judge goes upon the theory that even if the term "personal property" as used in Section 2731 is not broad enough

to include these bonds, the same term used in Section 2744 is broad enough, and that if Section 2734 must necessarily be construed with Section 2731, Section 2744 need not be, because, as he read it, it enlarges the meaning of the term "personal property."

This is in direct conflict with *Lander* v. *Burke* (65 Ohio St., 532), where it was held (p. 542) that Section 2744 *must be* construed in the light of the provisions of Section 2731. Therefore, even granting that the words "personal property" in Section 2744 taken alone *are* broad enough to include "investments in bonds" and to require their return by officers of corporations if the instruments themselves are in the state, we have still, under the authority of *Lander* v. *Burke*, to look to Sections 2730 and 2731 to find when they are in the state, for the purposes of taxation, viz., whether they are *owned or held by persons residing in this state*. Under the definitions of Sections 2730 and 2731, if they are not so owned or held, they are not in the state, and are, therefore, not directed to be returned by the use of the words "personal property" in Section 2744.

Much stress is laid, in Judge Lurton's opinion, upon the fact that these bonds constitute a part of the "capital stock" of the company *invested in Ohio*, and that they should, therefore, be returned under Section 2744, Revised Statutes of Ohio, because "personal property" includes "capital stock" "so far as such capital stock is invested in the state."

The suggestion carries no force because it begs the question. To characterize the bonds as "capital stock" in no degree changes their status as taxable property, because the controlling question remains, "are they capital stock invested in the state?" If the bonds are tangible property and in Ohio, they are taxable as such without the aid of the suggestion that they may also be regarded as a part of the "capital stock of the company." If, on the other hand, the bonds can be considered only as intangible property under the laws of Ohio, then they are not in Ohio

unless owned or held by a person or corporation within the state. And if they are so owned or held they are taxable as "investments in bonds" whether they be considered as "capital stock" or not. If they are not so owned or held they are not in Ohio within the meaning of the tax laws, and, consequently, even if viewed as capital stock, they are not capital stock invested in Ohio.

There is nothing in the case of *Hubbard* v. *Brush* (61 Ohio St., 252), which conflicts with this view, although that case is quoted against it. The facts were as follows: A number of Ohio citizens had taken a corporate charter from the state of West Virginia. They had no offices in West Virginia and transacted no business in that state. Their principal office was located in Ohio and their entire business there transacted. Their officers and agents lived in Ohio and there managed all the affairs and assets of the company. The property sought to be taxed was book accounts, etc.—credits—intangible property—admittedly incapable of a separate situs under Ohio tax laws. The corporation contended that the situs of these choses in action was in the state which created the corporation, upon the theory that the owner (the corporation) could only dwell in that state. The contention of the taxing officer was, not that these credits were *tangible* property in Ohio (the contention here) but that they were held, operated and controlled in the state by persons residing in the state, and, therefore, were intangible property with a situs here for taxation.

In deciding the case the Supreme Court is careful not to disturb the construction of the law for taxing intangible property announced in *Grant* v. *Jones*, *Worthington* v. *Sebastian*, *Payne* v. *Watterson*, *Myers* v. *Seaberger* (*supra*) and other cases.

In deciding that the property was properly taxed in Ohio they carefully qualify their language (p. 264):

"We hold, therefore, that the provisions of Section 2744, which make it the duty of foreign incorporations to list for taxation in this state their choses in action, *where they are held within this state* and grow out of the business they conduct herein, is a valid exercise of the taxing powers vested in the state."

It was because they were held in the state that they were taxable, not because the books in which the balances appeared on the paper on which the notes were written happened to be in the state.

But again, a consideration of Section 2744 from another point of view leads to the conclusion that it has no application to foreign insurance companies. The returns of corporate property generally are provided for in two sections, 2734 and 2744. Section 2744 is limited by its terms to the returns of all corporations "except banking or other corporations whose taxation is specifically provided for." It is followed by Section 2745, which reads as follows:

"Section 2745. (Returns by foreign insurance companies.) Every agency of an insurance company, incorporated by the authority of any other state or government, shall return to the auditor of each county in which such company does business, or from which it collects premiums, on or before the first day of May, annually, the amount of the gross premium receipts of such agency for the previous calendar year in such counties; provided, however, that in the case of regular companies, wherein policy holders participate in the surplus and earnings of the company, dividends or surplus from previous payments allowed and used in the payment of current premiums, cancellation or surrender values, and commissions paid to the citizens of this state, during the same period, for which receipts are reported, shall be deducted from such gross receipts, and the net amount after such deduction shall be the basis of taxation for such companies in the counties, which shall be entered upon the tax list of the proper county, and the subject to the same rate of taxation, for all purposes, that other personal property is subject to at the place where located; * * * And it shall be the duty of the Superintendent of Insurance,

in the month of December, annually, to charge and collect from all such companies such sum as, added to the sum paid to the county treasuries, will produce an amount equal to two and one-half per cent. on the gross premium receipts of such companies, as shown by their annual statements, under oath, to the insurance department; * * * All taxes collected under the provisions of this section by the Superintendent of Insurance shall be paid by him, upon the warrant of the auditor, into the general revenue fund of the state."

Prior to the year 1850, banking, insurance and bridge companies incorporated under the laws of Ohio paid as taxes five per cent. of the dividends made by such companies within the year. Foreign insurance companies were taxed six per cent. of the amount of profit on premiums earned during the year. Neither class of corporations appear to have been taxed in any other way.

(See Chase's Statutes, pp. 1820-1821).

After the adoption of the constitution of 1851 the whole scheme of taxation was revised in an Act passed by the Legislature on April 13, 1852. Section 21 of this Act (50 Ohio Laws, 145) contained in a single paragraph the substance of Sections 2744 and 2715, the second proviso of Section 21 being the first form in which Section 2745 appeared. The entire section was as follows:

"Section 21. The president, secretary or principal accounting officer of every canal or slackwater navigation company, railroad company, turnpike or plank road company, bridge company, insurance company, telegraph company, or other joint stock company, *except banking or other corporations whose taxation is specifically provided for in this act*, for whatever purpose they may have been created, whether incorporated by any law of this state or not, shall list for taxation, at its actual value, its real and personal property, moneys and credits, within this state, in manner following: In all cases return shall be made to the several auditors of the respective counties where such property may be situated, together with a statement of the amount of said property which is situated in each township, town, city, or ward therein. The value of all movable property shall

be added to the stationary and fixed property and real estate, and apportioned to such wards, towns, cities, and townships, *pro rata*, in proportion to the value of the real estate and fixed property in said ward, town, city, or township. And all property so listed shall be subject to, and pay the same taxes as other property listed in such ward, town, city or township. It shall be the duty of the accounting officer aforesaid, to make return to the auditor of state, during the month of May, of each year, of the aggregate amount of all property, real and personal, by him returned, as required by the provisions of this act, to the several auditors of the respective counties in which the same may be located. If the county auditor, to whom the returns are made, is of the opinion that false or incorrect valuations have been made, or that the property of the corporation or association has not been listed at its full value, or that it has not been listed in the location it properly belongs, or in cases where no return has been made to the county auditor, he is hereby required to proceed to have the same valued and assessed in the same manner as is prescribed in the several sections of this act, regulating the duties of county auditors; provided, that nothing in this section shall be so construed as to tax any stock or interest in any joint stock company held by the state of Ohio; *provided, that every agency of an insurance company incorporated by the authority of any other state or government, shall return to the auditor of the county in which the office or agency of such company may be kept, in the month of May, annually, the amount of the gross receipts of such agency, which shall be entered upon the tax list of the proper county, and subject to the same rate of taxation for all purposes, that other personal property is subject to at the place where located.*"

From that time until the revision of 1880 unimportant amendments were added.

The only corporations whose taxation seems to have been specifically provided for in this Act of April 13, 1852, and to which, therefore, the language italicized in the first part of Section 21 could be held to apply were banking companies (50 Ohio L., 144), the Ohio Life Insurance & Trust Company (50 Ohio L., 146) and foreign insurance companies (50 Ohio L., 146) to which latter companies the second proviso of Section 21 was

addressed. The language "except banking or other corporations whose taxation is specifically provided for in this Act" must be held to include foreign insurance companies, as otherwise the plural expression "other coporations" would be confined not merely to a single class of corporations, but to a single corporation, viz., The Ohio Life Insurance & Trust Company.

In the Revision of 1880, Section 21 of the Act of April 13, 1852, was merely divided into the two sections, Nos. 2744 and 2745, which still remain the same, with some amendments which do not apply here.

What was the effect of the second proviso of Section 21 of the Act of April 13, 1852, which is now Section 2745?

The Legislature might have said: "*Provided that in addition to the tax hereinabove provided for, every agency of an insurance company, etc.,*" or it might have said "Provided that in lieu of the tax hereinabove *provided to be paid by corporations generally, foreign insurance companies shall be taxed as follows.*" Such aid is not given and we are left to the usual guides to ascertain the legislative intent.

A "proviso" in a statute is defined in Dwarris on Statutes (p. 514) as "something engrafted upon a preceding enactment, and (it) is legitimately used, for the purpose of taking special cases out of the general enactments and providing specially for them (citing 9 B. & C., 35)."

In *Minis* v. *U. S.* (15 Pet., 423, at 445), Justice Story used the following language in defining the operation of a proviso (p. 445):

> "The office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the Legislature to be brought within its purview."

In re Webb (24 How. Pr., 247-249), in construing an act regulating enlistment of minors, the court say:

> "The office of a proviso is not to enlarge or extend the act, or the section of which it is a part, but rather put a limitation and a restraint upon the language which the law maker has employed."

Boon v. *Juliet* (2 Ill., 258):

> "A proviso in a statute is intended to qualify what is affirmed in the body of the act, section or paragraph preceding it."

In *Walsh* v. *Van Horn* (22 Ill. App., 170):

> "It is the office of a proviso in a statute to limit the body of an act or antecedent clauses."

In the Circuit Court the Halliday case was heard before Judge Thompson, who delivered in all, three opinions. In his first opinion (which is unreported) he held that the effect of Section 2745 was to exclude foreign insurance companies from the operation of Section 2744, and that therefore there was no tax upon their property in the state. He afterwards reopened the case and asked counsel to reargue this proposition:—

Granting that Section 2745 excludes these companies from the operation of Section 2744, is their property within the state not taxed under the last clause of Section 2734, which provides for the return of property "of every company, firm or corporation by the president or principal accounting officer, partner or agent thereof."

Thereafter he decided (110 Fed. Rep., 259), that the bonds were taxed under Section 2731 and should be returned for taxation under Section 2734, either by the officers of the company or by the Superintendent of Insurance as a trustee.

After another reargument, he delivered the opinion reported in 127 Fed. Rep., 830. He there held that the bonds were returnable under Section 2744, notwithstanding the language of the original proviso, now Section 2745. This last view was sub-

stantially adopted by Judge Lurton, who also declined to decide whether the return should have been made by the company's officers or by the Superintendent of Insurance.

In view of this evident uncertainty on the part of the learned judges who considered the Halliday case, as to under what section and by whom these bonds should have been returned for taxation, upon their theory that they are taxed, it becomes especially important to examine these sections, and to ascertain their meaning. As Judge Lurton says, the sections are all to be read together. They are all parts of one act of the Legislature, putting into operation a general system of taxation, and there should be found in them neither inconsistencies nor contradictions.

Section 2734 declares: "Who shall list personal property." It covers the entire field in general terms. Among its other provisions is that return shall be made of the property of "every company, firm or corporation by the president or principal accounting officer, partner or agent thereof."

Sections 2744 directs more specifically how the returns of corporations shall be made. The section does not in any way change the provisions of Section 2734. Returns are to be made by the president, secretary and principal accounting officer, thus placing this duty upon the same class of officers already selected by Section 2734. But the section supplements Section 2734 by further providing in what form the returns shall be made, and upon a careful reading of the section the need of something more than the general language of Section 2734 and which the Legislature obviously intended to supply by Section 2744, is at once clear. Certain classes of corporations such as navigation railroad, telegraph, bridge companies and the like owned large amounts of property, difficult to classify and locate, and which might entirely escape under the general language of Section 2734. Telegraph wires and poles were affixed to realty, so were cross-ties, rails, switches and sim-

ilar property. Cars and canal boats were here to-day and away to-morrow. To avoid differences and confusion between realty and personalty, the section provides that "personal property shall include all such real estate as is necessary to the daily operations of the company." To cover the case of movable chattels the section provides that their gross value shall be apportioned among the various taxing districts in which the company owning them pays taxes on real estate or fixed property. Moneys and credits are also provided for, but are incidental to the evident purpose of the act.

There still remained foreign insurance companies. Here was a class of corporations doing business in the state and deriving a large revenue therefrom who generally owned no real estate, and needed no personalty in the state of a tangible nature in the conduct of their business. They acted entirely through agents, who furnished their own offices and sent their principals the proceeds daily, weekly or monthly. Under the provisions suitable for navigation companies, railroads, etc. (the present Section 2744) they might entirely escape taxation. Therefore, they were withdrawn from the operation of those provisions, and a new and distinct method of taxation was applied by the language of the proviso now contained in Section 2745. This puts upon their agencies in the state the duty of returning for taxation, in the various taxing districts, the gross premiums received by them during the year, as so much personal property to be taxed like other personal property in the same district.

There is, therefore, nothing inconsistent in these laws. Section 2734 construed with Section 2731 is intended to cover the entire returns of corporate property as well as all other property in the state. Section 2744 supplements that section in regard to corporations by specifically providing for the return of certain property which might not be returned under the general language of Section 2734; and Section 2745 provides for a revenue from a class of corporations which could not

be reached by Section 2744, by requiring them to return their gross yearly income as so much property.

It is urged that Section 2745 provides for a tax on business, that our position would amount to a substitution of a tax on business for a tax on property which would thereby become exempt from taxation, and that this, even if intended by the Legislature, would be unconstitutional. The result does not follow. It is clear that Section 2744 does not affect the return of ordinary property of foreign insurance companies, but any property in the state owned by them which should be taxed under Section 2731 must be returned for taxation under the provisions of Section 2734 by the "president, principal accounting officer or agent thereof."

In view of the authorities quoted, it is plain that the State of Ohio in her system of taxation has elected to consider investments in bonds as intangible property, and that an effort to tax them as tangible property is opposed to the clear meaning of her laws and the express decisions of her Supreme Court.

It remains to be considered whether these bonds are held by some person in the state in some such capacity as would bring him within the law requiring from him their return for taxation. If they are so held, they are properly taxable in Ohio at the place of residence of such person. In the language of the Supreme Court of Ohio, in *Grant* v. *Jones* (39 Ohio St., 306):

> "If they are not so held, but are owned and held by non-residents, they are not subject to taxation."

The bill alleges in substance that these bonds are the property of complainant below, whose home office is in Edinburg, Scotland, and whose chief office is in the United States, from which it conducts all its business in Ohio, is Hartford, Conn.; and that they are registered in the name of the Superintendent of Insurance of the State of Ohio for the use and benefit of the policy-holders in Ohio. The bill further alleges that the com-

pany has no general office in the state of Ohio. All of these facts are admitted by the demurrer. The only person, therefore, who could possibly furnish a taxing situs for the bonds would be the Superintendent of Insurance considered as a trustee. If he is a *trustee* and *holds* them, in the sense in which these words tion under Section 2734. If he is not a *trustee* in the sense the word is used in Section 2734, or if he does not *hold* them in the sense the word is used in Section 2730, then the bonds have no situs in Ohio and are not taxed there.

The meaning to be attached to the word "held" in Section 2730, which specifies investments in bonds *of* persons residing in this state, "whether *held* for themselves or others," has been adjudicated in *Myers* v. *Seaberger* (45 Ohio St., 232), and by the U. S. Circuit Court in *Walker* v. *Jack* (79 Fed. Rep., 138). In these cases the courts held that mere possession of the evidence of a chose in action, or a *qualified* authority with reference thereto, does not constitute a *holding* in the sense the word is used in these statutes. The court in *Myers* v. *Seaberger* (45 Ohio St., 232, at p. 236) calls attention to the fact that:

> "Any other construction would require every attorney in the state engaged in making collections for non-residents, to return the same for taxation. Such could not have been the intention of the Legislature, nor does the language of the statute require that such construction should be placed on it."

In deciding the case of *Walker* v. *Jack*, the U. S. Circuit Court say (p. 140):

> "If we refer to the definition of the word '*hold*,' we find that, as given by Anderson in his Law Dictionary, it means 'possessed by lawful title,' as, 'hold,' a 'note' or 'bond; * * * In *Witsell* v. *Charleston*, 7 S. C., 99, it was decided that, 'as the technical term, 'hold' embraces two ideas,—that of actual possession of some subject or dominion of property, and that of being invested with legal title or right to hold or claim such possession.' A similar ruling was made in *Hurst* v. *Hurst*, 7 W. Va., 297."

The Circuit Court of Hamilton County, in *Sims* v. *Best*, (*supra*), in speaking of bonds deposited under precisely similar circumstances with the Treasurer of State, say of that officer:

> "He has no right or control over these bonds, and not a particle of interest in them either as to principal or interest except as an officer of the state and as the custodian of them. * * * The law does not contemplate, in the least, that any kind of ownership or title to these bonds should rest in the Treasurer of State."

In the case at bar the facts are identical with the case last referred to. The bonds are controlled from the office of the company in Hartford, Conn. The Superintendent is a mere custodian and has no power or authority over them or their proceeds. He can not, under the statute, subject them to any claim against the company. That must be done by the person holding such claim by proper proceedings instituted in that behalf and neither permission nor co-operation is necessary on the part of the Superintendent. It is clear, therefore, under these authorities that the Superintendent of Insurance does not *hold* these bonds in the sense necessary to give them a situs in Ohio for taxation, under Section 2731.

It is equally clear from an examination of the authorities that he is not a "trustee" of the bonds in the sense the words are used in Section 2734, Rev. Stat. Ohio.

In *McNeill* v. *Hagerty* (51 Ohio St., 255), the meaning of the word "trustee" as used in Section 2734 is discussed by the court. In that case an assignee for the benefit of creditors was sought to be taxed upon the funds in his hands.

The court say (p. 266):

> "It is, however, urged that the clause of Section 2734 which requires that the property of every person for whose benefit property is held in trust must be listed by the trustee, furnishes authority for requiring such listing by an assignee of an insolvent. It is true that, in a general, broad sense, an assignee is a trustee,

and, in other sections of the Revised Statutes, the terms 'assignee' and 'trustee' are coupled as though the words mean the same.

"But it does not follow that the term 'trustee' is used in this broad sense in this clause of the statute, for equally, in the same sense, is a guardian or administrator, or a receiver, a trustee, and if the term had been intended in so broad a sense as to include assignees of insolvents, it would also embrace the other trustees named, and the special provisions regarding them would be superfluous. We think the purpose of this clause is fully satisfied by confining its application to that large class of trusts where title and possession are placed in one for the benefit of others *in some permanent form, and from which, in general, interest income or profit is expected to be derived.*"

In that case the assignee was merely *holding* the assets for the benefit of creditors and awaiting order of distribution.

In *French, Treasurer,* v. *Bobe, Assignee* (64 Ohio St., 323), this question of taxing an assignee as a trustee again came before the same court. There, Bobe, the assignee, *had obtained an order to continue the operation of the business, and was operating it for the benefit of creditors and assignor.*

On p. 341, the court say:

"The rule of law applied to the McNeill case has no application to the present case. In substance, and in all essential particulars, the position of the assignee in this case is much like that of a receiver. He is clothed with the legal title to the property of which he has possession (which can not be said as to a receiver), but in no other particular is there any real difference. He has held, and is holding, the property, not for the purpose of sale and distribution, *but for the purpose* of operating the same for profit. * * * As a receiver, if directed by the court, manages the property in the interest of creditors, so this assignee manages under the order of court for the benefit of creditors; * * * As a general rule, it may be stated that there is no sound principle upon which the property of a person or corporation in the hands of a receiver *to be managed* for the interests of those concerned, can be regarded as exempt from the burden of taxation."

In the closing lines of the opinion, the court refers to the "spirit of the requirement of Section 2734," meaning thereby that the managing for profit by one, of assets belonging to others, affixes a duty upon the resident operator to return the assets for taxation.

The court held that there is no magic in names. The same official, be he assignee, or trustee, or receiver, would under certain circumstances be taxed, whereas under other circumstances he would not be taxed.

From a comparison of these two decisions, the conclusion is inevitable that the state intends to tax assets belonging to non-residents but being operated by some resident in Ohio in the expectation of deriving a benefit from that operation for the absent *cestui que trust*. To put it differently, if the resident of Ohio is managing the funds or assets in his hands so that such property has *an independent value in his hands, as distinguished from the value of the credit in the hands of the creditor, then, and not otherwise, is it to be listed for taxation.*

We have no such circumstances here. The superintendent holds these bonds as a *pledge*. Call him a trustee, if you will, but he has no more power to *deal* with the bonds than an assignee holding assets awaiting an order of distribution (the McNeill case). He can not sell them or exchange them. He can not even collect the interest on them. His whole duty is to hold them until such time as by law they may be subjected to the claims of unpaid policy-holders; and then his duty, as defined in *State, ex rel*, v. *Matthews* (64 Ohio St., 419), is to distribute "the funds so deposited with him *pro rata* among the several policy-holders, and when their just claims shall all be satisfied, to pay the balance, if any, to the company"—the very relation to a fund which the Supreme Court in the McNeill case (*supra*) says does not contemplate a "return for taxation" within the "spirit" of Ohio tax laws.

This precise question was also adjudicated in *Sims* v. *Best* (*supra*). Speaking of bonds deposited with the Treasurer of State by a corporation, under precisely similar circumstances to those of the case at bar, the court said:

> "We are clearly of the opinion that the bonds required by law to be deposited with the Treasurer of State, do not in any sense constitute him a trustee or owner in any sense. He has no right or control over these bonds, and not a particle of interest in them as as to principle or interest except as an officer of the state and as the custodian of them."

There are no Ohio authorities to the contrary.

If the bonds deposited with Treasurer of State, the taxation of which was the subject of litigation in the case of *Sims* v. *Best et al*, were tangible property, they were admittedly in Columbus and should have been taxed there. If they were intangible property, and the state officer was a trustee whose duty it was to return them, they still should have been taxed there. The court refused to tax them in Franklin county upon either theory, and held that they were intangible property whose taxing situs was the home office of the company. In that case the home office was in Hamilton county. In this case it is admittedly outside of the state. The reasoning of the court applies equally to both cases, and, we submit, concludes the discussion.

The case at bar depends upon the construction to be placed upon Ohio statutes. Authorities elsewhere are instructive only in so far as the statutes they construe resemble the Ohio statutes. Several outside authorities were quoted by Lurton, J., in the Halliday case, and some consideration of them would seem proper. One of these is *People* v. *Home Insurance Company* (29 Cal., 534). The California statute required a deposit of bonds by foreign insurance companies with some bank within the state as a condition precedent to doing business in California. In that case the Home Insurance Company through

its managing agents, who resided in California, deposited bonds with Wells, Fargo & Co., bankers, in compliance with the law of the state. The case is entirely different from the case at bar and the decision proceeds upon the theory that the bonds were under the control of an agent of the company residing in the state. The court say (p. 544):

> "In the case now under consideration, the securities *are* separated from the owner and his domicile, and in the hands of an agent in this state and in the character of property."

The bonds were not assessed against Wells, Fargo & Co., who held them, but against the managing agents of the company, who resided in the state but did not have possession of the bonds.

Furthermore, the California statute is very different from the Ohio Statute (Stat. 1859, p. 345, Sec. 2). It reads (p. 547, report, *supra*):

> "Every person, corporation, etc., owning, etc., or having possession, charge, or control of * * * any personal property situate, or being within the county, shall deliver to the city and county assessor, etc., a statement of all * * * personal property, etc., owned, etc., or which is in the *possession* or under the control of such person, firm, etc."

The Ohio statute reads:

> "Section 2734. * * * Every person of full age and sound mind shall list the personal property of which he is the owner, and all moneys in his possession, all moneys invested, loaned *or otherwise controlled* by him, as agent or attorney, or on account of any other person or persons, company or corporation whatsoever, etc."

The court said (p. 548):

> "Where it is not in the hands of the owner, it is usually held by someone else, under some agency or trust, and the statutes which have been referred to are comprehensive enough to reach it in most cases when

actually situated here, notwithstanding the foreign domicile of the owner.

"All personal property within the state is liable to taxation. *It may be within the state in the possession or under the control of a trustee, while the beneficial owner is a resident abroad; and in such case the assessment is to be against the person having the special interest or control. The actual* situs *and control* of the property *within the state is the condition which subjects it to taxation.* The owner will of course be assessed if he resides here and has it under his control; *if he resides in another state, the result is reached by charging his agent or trustee in actual possession.*"

Thus they hold in effect that any kind of an agent, so he have *possession* of the property, may be charged with the duty of listing it. This view of the California law differs from that taken of the Ohio law by the Supreme Court in *Myers* v. *Seaberger*, where it is laid down that mere possession does not constitute an agent in the sense the word is used in the Ohio statute. In the California case there was in fact a managing agent in the state, and the actual point decided, to-wit, the taxation of bonds in the hands of a managing agent, in no way interferes with our position.

The case of *British Com. Life Ins. Co.* v. *Commissioner of Taxes* (28 How. Pr., 41), is to the same effect as the California case. The rule announced in the second syllabus is:

"*The place of assessment* for the purposes of taxation of a *foreign corporation* doing business in this state, is *where the operations of the corporation are carried on, not at the residence of the Comptroller of the State who has charge of the securities deposited by the corporation under the statute.*"

On p. 57, the court say:

"It is objected on the part of appellant that the place of assessment should be where the Comptroller resides, upon the ground that he holds the funds as trustee, and he, and not the company, should be assessed. The property is the property of the company, *held* by them but *deposited* with the Comptroller as

security. It would not be taxable if the company did not carry on business in this state. By the provisions of Rev. Stat., Vol. I, Sec. 1, all lands and all personal estate within this state, whether owned by individuals or by corporations, are made liable to taxation, and by Section 4, debts due on bonds are included under the term personal estate. By I Rev. Stat., p. 908, Section 5, every person is to be assessed in the town or ward where he resides, for the personal estate owned by him, and by Section 6, the personal estate of every incorporated company liable to taxation on its capital shall be assessed in the town or ward where the principal office or place for transacting the financial business is located. * * * The return states that the place of business of the corporation is in the city of New York, which is admitted by the demurrer."

The court thereupon concluded that under these statutes, the *home office*, and not the Comptroller should list.

Catlin v. *Hull*, 21 Vt., 152, which is cited with approval in *People* v. *Home Insurance Co.*, was a case in which credits belonging to a non-resident were being managed, collected and reinvested by a resident agent. The case is on all-fours with *Walker* v. *Jack* (*supra*), and *Hoyt* v. *Commissioner of Taxes* (23 N. Y., 224). In the latter case the court say that "the actual situs *and control* of the property within the state is the condition which subjects it to taxation."

In *People* v. *Home Insurance Company* (*supra*) much stress was laid upon the cases of *Assurance Society* v. *Commissioner* (28 Barb., 318) and *Hoyt* v. *Commissioner* (23 N. Y., 224). Both the New York decisions are based upon an act passed by the Legislature of that state in 1855, which is much broader than any statute in Ohio, and they could be distinguished on that ground. But the doctrine of *Hoyt* v. *Commissioner*, as has already been said, is not disputed, being practically the same as that of *Myers* v. *Seaberger*; and although *Assurance Society* v. *Commissioner*, which was decided in 1858, seems to hold that the Comptroller of the State, for the purpose of effecting taxation, may be considered an

agent having bonds under his control, this was entirely abrogated by the decision of the Court of Appeals of New York in *British Com. Life Ins. Co.* v. *Comptroller*, 31 N. Y., 32, decided in 1865, where the decision of the lower court, quoted from above, to the effect that the comptroller was not such an agent as was required to list for taxation credits deposited with him, was affirmed.

Whatever be the law in New York, the meaning attached to the word "agent" in *Assurance Society* v. *Commissioner* (*supra*) is in direct conflict with the meaning put upon the same word by the Supreme Court of Ohio in *Myers* v. *Seaberger*, and the other decisions of the same court mentioned above.

In none of the statutes considered in the above cases in other states are "investments in bonds" treated as a separate subject of taxation. As bearing upon the construction placed by *Worthington* v. *Sebastian* and *Payne* v. *Watterson* (*supra*) upon the effect of their being specified as a separate class in the Ohio tax laws these authorities are, therefore, of no value.

In bringing to a close our argument upon the question whether these insurance deposits are taxed under the Ohio law, we venture again to criticize the opinion of Judge Lurton in the Halliday case (126 Fed., 257).

The learned judge calls attention to the statutes requiring domestic insurance companies to list their property under Section 2744, and in the same connection, says (p. 265):

> "Such companies are required by Sections 3634, 3637, 3640, Rev. St., 1890-92, to invest their capital stock in certain classes of bonds. If foreign insurance companies are not required to list bonds held by them in the state, neither are such domestic companies."

There is no analogy between the cases, for how can a foreign corporation which, to quote the language of the same judge in the same decision, "can dwell only in the place of its creation," hold property in Ohio except through an agent? And

that no agent holds or controls these bonds is alleged in the bill and admitted by the demurrer. If any one in Ohio holds them, it is not the corporation which owns them but the Superintendent of Insurance, as trustee. But, as we have seen, he is no trustee in the sense the word is used in the tax laws. The domestic insurance companies are required to and do invest their capital in similar securities, but they pay taxes upon them not where the bonds happen to be (which may be in New York, or on deposit in some other state as security for its policy-holders) but at their home office, where their residence is and where they are returned as intangible property, "investments in bonds" held and owned by residents of Ohio. And it would seem logical that the same class of securities belonging to a foreign corporation should be entitled to the same classification and treatment.

The history of Ohio in her treatment of foreign insurance companies does not indicate the intention suggested by Judge Lurton that this deposit is required for the purpose, among others, of enforcing the payment of taxes thereon.

The Supreme Court has said in *State* v. *Reinmund* (45 Ohio St., 214-217), where an attempt was made to so construe Ohio statutes as to impose a large increase of taxation upon a foreign insurance company:

> "This view is in consonance with the recognized policy of this state of long standing, which is to invite, rather than repel, the investment and use here of foreign capital. In this spirit the obvious interest of the state is to encourage the location here of agencies of companies organized in other states, having large experience as insurers and possessed of abundant capital, in order to afford to our people the manifold benefits of the security given by their contracts; and any unnecessary discrimination against those companies would be inconsistent with this enlightened policy, and would tend to injuriously affect our people. The language employed in the sections quoted fails to show any purpose on the part of the Legislature to depart from this well settled policy."

Prior to 1873 foreign insurance companies were required to deposit with the state negotiable notes secured by first mortgage upon Ohio property. No attempt was ever made to tax these notes.

From that date until 1894, the deposits were required to be made in United States bonds, property which the state had no power to tax. From 1894 until the present time the companies could deposit indifferently United States or municipal securities. If the intention was to force the companies to bring one hundred thousand dollars' worth of property into the state which might be taxed, as a condition of doing business, why permit the alternative of non-taxable United States securities, and why, in the statute authorizing the exchange of such bonds for municipal securities, were the taxes upon the latter not made a first lien upon the bonds, as the state is so careful to do in cases of decedents' estates, assignments, etc., instead of having the deposit limited to the use of Ohio policy-holders, and thereby deferring its claim for taxes to the claims of all policy-holders and putting itself on a par with the general creditors of the company? Why was the duty not specifically imposed by the statute, upon the Superintendent of Insurance to return these deposits for taxation?

Why should the state and its officers stand by for six years, knowing from the printed report of its treasurer that these bonds were on deposit, and make no effort to place them upon the duplicate?

And why, finally, when the attempt is made, under a statute passed five years after the amendment permitting the deposit of municipal securities (Section 2781*a*), to collect the taxes for six years—the longest period any of them had been on deposit—did the Legislature put its seal of approval upon the administrative construction of the laws and policy of the state which had been adhered to through the life of two constitutions in Ohio, by amplifying the language of Section 2745, as follows (97 Ohio Laws, 402):

"Insurance companies and associations, incorporated by the authority of another state or government, or the Superintendent of Insurance, shall not be required to make returns of deposits of such companies or associations, made as required by law with such Superintendent of Insurance for the benefit and security of policy-holders, and shall not be governed, in respect to such deposits, by the provisions of Section 2744 or of Section 2734 of the Revised Statutes of Ohio."

II.

Appellant Being a Non-Resident and Absent From the State, no Personal Judgment Can be Rendered Against it for These Taxes.

Besides other relief, the bill prays that defendants be enjoined from prosecuting a civil action now pending in the Common Pleas Court of Franklin County, Ohio, which was brought for the purpose of collecting from the appellant the taxes alleged in the bill to have been assessed against appellant upon the municipal bonds formerly on deposit with the Superintendent of Insurance of the state. The action was brought in accordance with and under the authority given to county treasurers by Section 2859 of the Rev. Stat. of Ohio, which reads as follows:

"Section 2859. (Authority of treasurer; mode of procedure; judgment shall be rendered.) When any personal taxes, heretofore or hereafter levied, shall stand charged against any person, and the same shall not be paid within the time prescribed by law for the payment of such taxes, the treasurer of such county, in addition to any other remedy provided by law for the collection of such personal taxes, is hereby specially authorized and empowered to enforce the collection by a civil action in the name of the treasurer of such county against such person for the recovery of such unpaid taxes; and it shall be sufficient, having made proper parties to the suit, for such treasurer to allege in his bill of particulars or petition that the said taxes stand charged upon the said duplicate of said county

against such person, that the same are due and unpaid, and that such person is indebted in the amount appearing to be due on said duplicate, and such treasurer shall not be required to set forth in his petition any other or further special matter relating thereto, and said tax duplicate shall be received as *prima facie* evidence on the trial of said suit of the amount and the validity of such taxes appearing due and unpaid thereon, and of the non-payment of the same, without setting forth in his bill of particulars or petition any further special matter relating thereto; and if, on the trial of the action, it shall be found that such person is so indebted, judgment shall be rendered in favor of such treasurer so prosecuting such action as in other cases; and the judgment debtor shall not be entitled to the benefit of the laws for stay of execution or exemption of homestead, or any other property, from levy or sale on execution in the enforcement of any such judgment."

The defendant was served by summons upon its agent and is in court. It will be noticed that the civil action provided for in this section is entirely *in personam* and independent of the proceedings in distraint instituted by the Treasurer of Franklin County against the United States bonds on deposit with the Superintendent of Insurance in a further attempt to collect the same taxes. The bringing of this civil action provided for in Section 2859 is an endeavor to charge the non-resident owner with the taxes as for a *debt*.

Our position is that, waiving the question of the validity of the taxes assessed upon the bonds, the state's right to these taxes is nothing more than a *right in rem* against the property taxed. The owner being a non-resident, and outside of the jurisdiction of the state, can not, by any enactment of the state Legislature, be held *in personam* for taxes assessed upon its property which happens to be within the state, although such taxes may appear as a charge against the non-resident personally upon the books of the auditor.

In Judson on Taxation, under the sub-heading of "Juris-

diction of Persons for Taxation," the learned author says (Section 414):

> "But the taxing power of the state over persons obviously depends upon the domicile of the person, as domicile is the test of liability for purely personal taxes." Citing Dicey on Conflict of Laws (A. Ed. 171).

Judge Cooley, in his work on Taxation (p. 24, Third Edition), declares that:

> "Where a non-resident is owner of tangible personal property within the state, and the state imposes taxes upon it, *the tax is not a charge against the owner personally*, but must be enforced against the property itself. *The state has no jurisdiction to assess a tax as a personal charge against non-residents.*"

Upon this branch of the case the decision (Record, pp. 20 and 21) and decree (Record, p. 22) sustain our contention. The question was not considered by the Court of Appeals in the Halliday case the court holding that it was not presented upon the record in that case.

The theory upon which our adversaries attempt to uphold their right to maintain a civil action against appellant, under Section 2859, would seem to be that the "due process of law" guaranteed by the Fourteenth Amendment to the Constitution of the United States, is fulfilled so long as *service of summons* in the action is had in accordance with the state statutes regulating service upon non-residents. They quote Section 5027, Rev. Stat. Ohio ("An action against a non-resident of this state, or a foreign corporation, may be brought in any county in which there is property of or debts owing to the defendant, or where such defendant is found, or where the cause of action or some part thereof arose"), and reading this section, in connection with those providing for service of summons upon agents of foreigns corporations, they say: You have nothing to complain of. In coming into the state to do business you submit

yourselves to our laws. You have been properly served with a summons under those laws, to appear in her courts and to answer a prayer for a personal judgment against you for these taxes. There has been due process of law, and your constitutional rights have been properly protected.

The fallacy lies in overlooking the fundamental difference between antecedent or primary rights, on the one hand, and secondary or remedial rights, on the other. Speaking of this distinction, Holland, in his "Jurisprudence" (p. 124) uses the following language:

> "The nature of the distinction is sufficiently simple. The rights of the owner of a garden not to have it trespassed upon, of a servant to have his wages paid, of a purchaser to have his goods delivered to him, are all of the former kind, viz., rights 'antecedent,' which exist before any wrongful act or omission. They are rights which are given for their own sake. The right of the owner of a garden to get damages from a party of men who have broken into his grounds, of a servant to sue his master for unpaid wages, of a purchaser to get damages from a vendor who refuses to deliver the goods sold, are, on the other hand, of the latter kind, or rights 'remedial'; they are given merely in substitution or compensation for rights antecedent, the exercise of which has been impeded, or which have turned out not to be available.
>
> "If all went smoothly, antecedent, or primary, rights would alone exist. Remedial, or sanctioning, rights are merely part of the machinery provided by the state for the redress of injury done to antecedent rights."

See also,

Pomeroy's Remedies and Remedial Rights, Section 1.

To apply this classification directly to the facts in the case at bar, the State has the right to levy and assess taxes with respect to persons or property within its jurisdiction. This right is primary, and all steps necessary to a valid levy and assessment have to do with *substantive* law. When taxes have once been properly levied and assessed and they are not

paid, a secondary or remedial right belongs to the state, to-wit, the right to collect these taxes by distraint, or attachment, or arrest, or civil action. The rules regulating the enforcement of this right belong to *adjective* law. It is plain that a secondary or remedial right can not arise until a breach of a primary or antecedent right has occurred, and it is equally plain that a *breach* of a primary right can not occur unless there is a primary right to break.

Grant, therefore, that in the civil action, the prosecution of which is sought to be enjoined, the rules of procedure have been complied with, that the defendant has been served with summons, and is properly before the court, the test of "due process of law" has still to be applied to the alleged primary right, for the breach of which the state sues. For before the state can collect a tax from an individual, resident or non-resident, there must be a tax due from the person sought to be personally charged, and without this antecedent right and its correlative duty, an enforced collection is nothing more or less than confiscation, however strictly the method of collection may conform with the adjective law of the state.

These taxes stand upon the auditor's books of Franklin county charged against the appellant personally. The civil action sought to be enjoined is an attempt to enforce their collection by a personal judgment against it. But a state has no right to impose taxes upon a non-resident as a personal liability, and an effort on her part to do so is within the inhibition of the Fourteenth Amendment of the Constitution of the United States, and should be enjoined.

As stated by Mr. Justice Field in *State Tax on Foreign Held Bonds Case* (15 Wall., 300, at 319):

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects *within the jurisdiction of the state.* These subjects are persons, property, and business."

The decision of this court in the case of *Dewey* v. *Des* Moines (173 U. S., 193), is in accordance with our position. In that case, the effort was made, under a statute authorizing personal judgment for taxes and assessments against owners of real estate, to hold a non-resident of the state of Iowa personally liable for an assessment made upon real estate owned by him in that state. The non-resident owner had voluntarily come into the courts of the state as a complainant and asked for an injunction against an attempt to hold him personally liable for such assessment.

On page 201 of the report, this court said:

> "It is said that the statute (Code of Iowa, Section 478) provides for the personal liability of the owner of lots in a city in the state of Iowa, to pay the whole tax or assessment levied to pay the cost of a local improvement, and that the same statute provides that the assessment shall also be a lien upon the respective lots from the time of the assessment. It is also said that the statute has been held to be valid by the Iowa Supreme Court. This seems to be true." (Citations.) "The same thing is also held in the opinion of the state court delivered in the case now before us.
>
> "In this case no question arises with regard to the validity of a personal judgment like the one herein against a resident of the state of Iowa, and we therefore express no opinion upon that subject. This plaintiff was at all times a non-resident of that state, and we think that a statute authorizing an assessment to be levied upon property for a local improvement, and imposing upon the lot owner, who is a non-resident of the state, a personal liability to pay such assessment, is a statute which the state has no power to enact, and which can not therefore furnish any foundation for a personal claim against such non-resident. There is no course of reasoning as to the character of an assessment upon lots for a local improvement by which it can be shown that any jurisdiction to collect the assessment personally from a non-resident can exist. The state may provide for the sale of the property upon which the assessment is laid, but it can not under any guise or pretense proceed farther and impose a personal liability upon a non-resident to pay the assessment or any part of it. To enforce an assessment of such a

nature against a non-resident, so far as his personal liability is concerned, would amount to the taking of property without due process of law, and would be a violation of the Federal Constitution.

* * * * * * * * *

"The jurisdiction to tax exists only in regard to persons and property or upon the business done within the state, and such jurisdiction can not be enlarged by reason of a statute which assumes to make a non-resident personally liable to pay a tax of the nature of the one in question. All subjects over which the sovereign power of the state extends are objects of taxation. Cooley on Taxation, 1st. Ed., pp. 3, 4; Burroughs on Taxation, Section 6. The power of the state to tax extends to all objects within the sovereignty of the state. (Per Mr. Justice Clifford, in *Hamilton Company* v. *Massachusetts*, 6 Wall., 632, at 638.) The power to tax is however limited to persons, property and business within the state, and it can not reach the person of a non-resident. State Tax on Foreign-held Bonds, 15 Wall., 300, 319. In Cooley on Taxation, 1st Ed., p. 121, it is said that 'a state can no more subject to its powers a single person or a single article of property whose residence or legal situs is in another state, than it can subject all the citizens or all the property of such other state to its powers.' These are elementary propositions, but they are referred to only for the purpose of pointing out that a statute imposing a personal liability upon a non-resident to pay such an assessment as this oversteps the sovereign power of a state."

The same question was recently considered by the Court of Appeals of New York in the *City of New York* v. *McLean* (170 N. Y., 374, decided April, 1st, 1902). It was held that, while the state had the power to levy a tax upon the personal property of a non-resident, and, for that purpose, to separate the situs of the owner from the actual situs of the property within the state and subject it to taxation because it was within the state limits, yet it could only enforce *payment* of the tax by virtue of its jurisdiction over the property. It had not, by virtue of that jurisdicton, any power to subject a non-resident owner to a personal liability for the tax, *even though personal service be had upon such owner in an action*

to collect. Certain shares of stock in a national bank doing business in New York City, and belonging to a resident of New Jersey, were, as required by law, assessed in New York city in the name of the non-resident owner. The bank failed to pay the taxes so assessed and suit was brought, under a statute similar to Section 2859, Rev. Stat. Ohio, in the New York courts against the non-resident owner for the recovery of a personal judgment for these taxes, and personal service of summons on him was obtained. The case is completely analogous to the case at bar, and is instructive because the state authorities contended, as do the state authorities here, that the defendant was properly in court, personal service having been had upon him, and that, therefore, due process of law had been observed. The court say, in the course of his opinion (p. 383):

> "It must be borne in mind that the real question involved is not the jurisdiction of the Supreme Court over the defendant, but is whether the board of taxes and assessments had such jurisdiction of defendant's person as to authorize it to impose upon him any liability which could be enforced as a personal claim. While it is true that the assessment in question was in form against the defendant personally, still, as the board had no jurisdiction of his person, the effect of the assessment was merely to impose a charge upon the bank shares owned by him and which were within the jurisdiction of the board."

In conclusion the court says (p. 387):

> "Thus, it becomes manifest that, even if the statutes of this state were intended to confer upon the officers of the plaintiff authority to maintain an action against the defendant, and to impose upon him a personal liability for the payment of the tax assessed upon his shares of stock, yet, so far as they attempted to confer that right they were beyond the power of the legislature to enact, and to that extent are invalid. This conclusion is not only fully sustained by authority, but it is also just and in accordance with the principles which lie at the basis of the right of taxation. Taxes, unlike debts, are not contractual, but are enforced contributions levied by the authority of the state

for the support of its government and other public needs. The justification for their demand is based upon the reciprocal duties of protection and support, and the exclusive sovereignty and jurisdiction of the state over persons and property within its territory. The citizen owes to the government the duty to pay taxes, so that the latter may be enabled to perform its functions, and he thus receives his proper compensation in the protection which the government affords to his life, liberty and property. This protection may be either to the rights of persons or the rights of property, and taxes may consequently be imposed upon either when within the jurisdiction of the state. But a personal tax can not be assessed against a non-resident, nor can a tax be assessed against his property, unless it has an actual *situs* within the state, and thus is under the protection of its laws."

It was urged in the court below, and will probably be urged here, that the decision in *Dewey* v. *Des Moines* has been great modified by the decision of this court in *Bristol* v. *Washington County* (177 U. S., 133). This modification was urged by counsel in the McLean case, and the Appellate Division of the Supreme Court of New York has, we believe, answered the suggestion completely in the following quotation from their opinion (57 App. Div. 601, 608):

"It is said, however, that the Supreme Court of the United States has held in the subsequent case of *Bristol* v. *Washington County* (177 U. S., 133), that a non-resident of a state assessed with respect to personal property in that state is personally liable for the tax. * * * The court held that that claim (for taxes) was valid, and that as the state had the right to levy a tax against the property of Mrs. Bristol which was therein situated, that assessment became a valid claim against the property, and for all purposes of administration was a debt which might be collected out of that property by a proper proceeding in that state. But it is to be noticed that the question there was not as to the personal liability of Mrs. Bristol, but as to the liability of her property which was situated in that state, and which by the express provision of the statute of that state was liable to the tax. Although Judge Fuller does say that the tax was a claim against the estate, he

does not say that it was a claim against Mrs. Bristol personally, nor is there anything in the case which could be construed as making any such holding.

"The true rule to be deduced, in my judgment, from all the cases is that, although the state has the power to levy a tax upon personal property of a non-resident situated within its boundaries and subject to its jurisdiction, and for that purpose may separate the situs of the owner from the actul situs of the property within the state, and subject it to taxation because it is within the state, yet it can only enforce payment of that tax by virtue of its jurisdiction over the *property*, and it has not by virtue of that jurisdiction any power to subject the owner of it to a *personal liability* for the tax."

Referring to *Bristol* v. *Washington County* and *Blackstone* v. *Miller*, this court in *Board of Assessors* v. *Comptoir National* (191 U. S., 388, at 403), says:

"From these cases it may be taken as the settled law of this court that there is no inhibition in the Federal Constitution against the right of the state to tax property in the shape of credits where the same are evidenced by notes or obligations held within the state, in the hands of an agent of the owner for the purpose of collection or renewal, with a view to new loans and carrying on such transactions as a permanent business."

In *LaFayette Insurance Company* v. *French* (18 How., 404, at 407), Curtis, J., says:

"A corporation created by Indiana can transact business in Ohio only with the consent, expressed or implied, of the latter state. * * * This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other states and by this court, *provided* they are not repugnant to the Constitution and laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others."

Appellant is admittedly a non-resident of Ohio, and is treated as such by the state. The deposit here sought to be

taxed is required because it is a non-resident. The power of the state for taxing purposes upon property found within its jurisdiction is, as we have seen, apparently unlimited, whether it belongs to residents or non-residents; the power of the state to impose conditions upon non-resident corporations desiring to do business within its borders is apparently one to be measured only by the conscience of its Legislature; but the power in each instance stops at the state boundary. The state can refuse a non-resident corporation permission to do business within its territory, or can regulate its admission, or can oust it therefrom as punishment for disobedience to its laws; but there its power over the corporation itself ceases. It can not by a proceeding *in personam*, fasten the duties of citizenship, such as a personal liability for a tax, upon the subject of another sovereign.

III.

THE MUNICIPAL BONDS FORMERLY ON DEPOSIT BEING NO LONGER WITHIN THE STATE, THE TAXES LEVIED WITH RESPECT TO THEM CAN NOT NOW BE COLLECTED BY DISTRAINT OR OTHER PROCEEDING IN REM DIRECTED AGAINST THE COMPLAINANT'S UNITED STATES BONDS NOW DEPOSITED IN THE STATE.

In October, 1900, the auditor of Franklin county entered upon his duplicate against complainant as owner, taxes upon its deposit of municipal bonds for a period of six years, from 1895 to 1900 inclusive.

On November 15, 1900, the treasurer of Franklin county brought a civil action against complainant, under Section 2859, for the taxes so assessed against it. No effort was made by the treasurer to attach or distrain the municipal bonds, which remained on deposit with the Superintendent of Insurance until April 2, 1903.

On that date United States bonds were deposited with the Superintendent of Insurance under the provisions of Section

3660 permitting an exchange, and the municipal bonds were forwarded to complainant at Hartford, Conn., by the Superintendent of Insurance.

A year after the Superintendent had sent the municipal bonds out of the state, a warrant of distraint was issued by the county treasurer, and effort made to seize thereunder the United States securities then on deposit with the Superintendent.

A charge or claim upon the United States securities now on deposit, for the taxes levied with respect to the municipal bonds formerly within the State and for which they were substituted, can only arise in two ways:

First, upon the theory that the non-resident owner is *personally liable* for the taxes assessed against it with respect to the former deposit, so that any property belonging to it and being found within the state may be subjected to the payment of the owner's debt or default.

Secondly, upon the theory that the municipal bonds formerly on deposit were charged with the payment of the taxes and that this charge has in the act of substitution been transferred to the United States securities.

The first theory has been, we believe, dealt with at sufficient length *supra*. If the state has no right to make complainant personally liable by a civil action, neither can it by a proceeding *in rem* directed against complainant's property, enforce the payment of a tax as a personal charge due from it, where the state had no jurisdiction of it personally in levying the tax. The *antecedent* right being lacking, adjective law, either by proceedng *in rem* or *in personam*, is powerless to supply the deficiency; a distress warrant is as futile as a civil action.

The second theory, that these United States bonds have in some way become charged or invested with an impersonal liability for these taxes can not be supported.

Under the laws of Ohio all taxes except those upon real property are assessed against some *person* owning or controlling the property *and not against the property itself.* There is no provision in the statutes for placing personal property belonging to an unknown owner and found within the state upon the tax duplicate, as there is in the case of real estate (R. S., Section 2798).

All the provisions for collecting taxes levied with respect to all classes of personalty are based upon the personal liability therefor of some owner or holder whose duty it was to return the property for taxation.

Section 2859, which gives the treasurer the right to collect by civil action, declares:

> "When any personal taxes, heretofore or hereafter levied, *shall stand charged against any person,* * * * the treasurer * * * is hereby specially authorized and empowered to enforce the collection by a civil action in the name of the treasurer of such county *against such person* for the recovery of such unpaid taxes; * * * and if, on the trial of the action, it shall be found that *such person is so indebted,* judgment shall be rendered, etc."

The law permitting distraint for personal taxes is as follows:

> "Section 1095. (Overdue taxes may be collected by distress.) When taxes are past due and unpaid, * * * the county treasurer, or his deputy, may distrain sufficient goods and chattels *belonging to the person or persons charged with such taxes,* if found within his county, to pay the taxes so remaining due and the costs that have accrued; etc."

The law providing for placing upon the duplicate personal property which has escaped taxation is as follows:

> "Section 2781. (Action of auditor upon false tax return or evasion of return.) *If any person* whose duty it is to list property or make a return thereof for taxation, * * * shall in any year or years make a false return or statement, or shall evade making a re-

turn or statement, the county auditor shall for each year, ascertain as near as practicable, the true amount of personal property, moneys, credits and investments that *such person ought to have returned or listed* * * * and accordingly enter the same on the tax lists in his office, giving a certificate therefor to the county treasurer who shall collect the same as other taxes."

Section 2838, which provides when the lien of the state for taxes shall attach, is as follows:

"Section 2838. (When lien of state for taxes attaches.) The lien of the state for taxes levied for all purposes, in each year, shall attach to all real property subject to such taxes, on the day preceding the second Monday of April, annually, and shall continue until such taxes, with any penalty which shall accrue thereon, shall be paid; all personal property subject to taxation shall be liable to be seized and sold for taxes; and the personal property of any deceased person shall be liable, in the hands of any executor or administrator for any tax due on the same by any testator or intestate."

This section was construed in *Spence, Assignee,* v. *Frye, Treasurer* (2 Weekly Law Gazette, 103). In that case the court decided that taxes are not a lien in Ohio upon the personal property of the person against whom they are assessed *until actually seized and distrained by the treasurer;* that a person can dispose of all his personal property at any time before actual distraint, free of all lien, or claim for taxes.

The same section was construed by the Jefferson County Probate Court in *Citizens Bank Assignment* (2 Western Law Monthly, 121). The court says:,

"This liability of personal property to be seized and sold *does not constitute a lien on the property.* The Legislature have made a clear distinction between real and personal property here, and in doing so have only followed the uniform course of legislation and the well established principle of law respecting liens upon these two kinds of property. A judgment becomes a lien upon lands without levy, but a judgment does not become a lien on personal property until it be seized

in execution. * * * A lien on personal property is the right to retain it in possession until some charge upon it is paid. Possession of the goods is always necessary to create a lien, and possession is necessary to continue it." Citing Lord Mansfield, Ch., J., 4 Burr., 222; *Kirkham* v. *Shullcross*, 6 T. R. 14; *Rushforth* v. *Hadfield*, 6 East. Rep., 519; 7 East. Rep., 224; 2 Kent, 638; 1 East., 4; *Jordan* v. *James*, 5 Ohio, 98.

It may be urged that Article XII, Section 2, of the Constitution requires all personal property to be taxed, and that Section 2731 has declared that:

> "All property whether real or personal in this state, and whether belonging to individuals or corporations * * * shall be subject to taxation, etc.,"

and therefore that these bonds, if they are tangible personal property, are taxed, in the sense that they are charged by that section with the duty of paying the taxes assessed with respect to them.

The Ohio Supreme Court has construed the effect of Section 2731 to be otherwise in *Chisholm* v. *Shields, Treasurer*, 67 O. S., 374. The court say (p. 377):

> "Section 2 of Article XII of the Constitution imposes upon the General Assembly the duty of passing laws taxing all property at its true value in money, with certain named exceptions. Under this section the General Assembly has enacted our tax laws, and has made a general provision in Section 2731 that 'all property, real or personal, in this state, and whether belonging to individuals or corporations; and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this state' shall be taxed, etc.
>
> "It is claimed by counsel for defendant in error, that this legacy is an investment in an annuity, and being of the same general class as credits, investments in bonds and stocks, that it is included within the word '*otherwise*,' that all property must be taxed, and that as this legacy is property, it must also be taxed. But this section is only the declaratory section, and subsequent sections, especially 2736, 2737 and 2739 carry this declaratory section into execution, and prescribe the manner in which taxation is to be imposed upon

> property therein specified; and property not so specified in any section, is not taxed; as for instance, investments in life insurance policies are not taxed, for the reason that no statute authorizes their taxation, although thousands, if not millions of dollars are invested in them, many being fully paid up, and others having a surrender value. Such policies are clearly property, and very valuable property at that, but not taxed, because no statute specifically requires their taxation. The same is true of many other valuable investments. So that the word '*otherwise*' in Section 2731 includes only such property or investments as are specifically mentioned and required to be taxed in the subsequent sections, and property or investments not so mentioned can not be taxed. And in so specifically mentioning and requiring to be taxed, the property must be such as is ordinarily included in the description given, and not such as can be brought within the description by a process of reasoning only, or by a strained construction. The General Assembly must be presumed to be able to fairly describe such property as it desires to tax, without resorting to a strained construction, or a course of fine reasoning."

The sections referred to by Judge Burket in that case as actually taxing property, are every one of them directed to the return of personal property, tangible as well as intangible, by some holder or owner who is to be personally charged with the tax in whatever capacity he may be required to make a return.

In view of the law as construed in these decisions, and this construction has never been questioned, it follows that Ohio has elected to make personal liability of some one the basis for the collection of all taxes levied with respect to personalty; and here there is and never has been any person liable for these taxes. It also follows that since the municipal bonds were not taxed or charged with the payment of taxes by ny step or proceeding, they left the state free of all liability for taxes, and there was no lien or incumbrance thereon to be transferred to the United States bonds substituted for them.

This court in *New Orleans* v. *Stempel* (175 U. S., 309, at 312), Mr. Justice Brewer, delivering the opinion, says:

> "Of course, there must be statutory warrant for such taxation, for if the Legislature omits any property from the list of taxables the courts are not authorized to correct the omission and adjudge the omitted property to be subject to taxation."

It is equally obvious that if the state has placed no charge upon personalty for taxes levied with respect to it, but has chosen to charge and hold either the owner of the property or some person upon whom is placed the duty to return the same for taxation, such omission (if it be an omission and not a design), is one which the courts are not authorized to correct, and such property must remain entirely free from liability or charge until such time as by the laws of the state it *is* charged with a liability, to-wit, when actually seized under a warrant of distraint or other process as the property *of some one who is personally liable for a tax thereon.*

A fortiori property substituted for the property with respect to which it was sought to assess taxes, where the substitution lawfully takes place before any proceeding against the original property, does not become liable to seizure for such taxes.

The court below sustains the right of the county treasurer to seize these United States bonds under a distress warrant, and examination of the grounds stated in the decision is therefore necessary.

In the first place, the court (Record, p. 18) assumes it to be an admitted fact that the municipal bonds originally on deposit were subject to taxation in Ohio. This has never been admitted by appellant and is one of the questions this court is now asked to determine.

But suppose the bonds *were* subject to taxation, is the court helped in its conclusion?

The learned Judge says (Record, 19):

> "These government bonds now on deposit are not being taxed, they are not subject to taxation, but an attempt is made to appropriate them to the pay-

ment of taxes which were properly levied upon other bonds, for which these bonds were substituted."

Again, he says:

> "Ordinarily the substitution of certain property, for other property means that it shall stand in the place of and represent the other for all purposes."

Therefore, the court argues, since the former bonds were liable for these taxes, those that were substituted for them are now liable for them.

But the former bonds were never charged with the payment of any tax. If we assume that they could have been so charged by being seized under some process for collection, still, this was never done, and, as we have seen, without this there is no lien or charge for taxes upon personal property in Ohio for taxes unpaid by the owner or holder. So the assumption of the learned Judge and his conclusion based thereon are equally erroneous.

Again he says (Record, p. 19):

> "Now, in order to sustain the complainant's position, the court would be required to construe this statute (Sec. 3660) to mean that the statute deliberately provided that the insurance company *might escape the obligation imposed upon it* to pay these taxes, at any time it saw fit, by simply withdrawing the original bonds deposited and replacing them with other bonds."

There *is* no obligation imposed upon complainant, a non-resident, to pay these taxes. The state has no right *in personam* So the learned Judge himself determined in the same opinion, and in consequence of that determination denied the right of the county treasurer to recover a judgment for the taxes in a civil action. To seek to hold the bonds now on deposit, because they belong to the same owner whose bonds were formerly on deposit, for a supposed personal liability of that owner to pay the taxes levied in respect for the former deposit, is but another way of making the non-resident owner personally liable for the payment of taxes, which the state is powerless to do.

The learned Judge calls to his aid the provisions of Section 3660. He says (Record, pp. 19, 20):

> "It seems to me that this must be held to have been the understanding between the parties here, the state and the insurance company; that the state in granting this license to do business in this state provided that these bonds might be replaced by other bonds, upon the condition that the substituted bonds should in every way take place of the original bonds, and that the state did not intend to relinquish or surrender any rights which it had, under the deposit of the original bonds.
>
> "These bonds, when deposited, were held by the superintendent of insurance, not only to insure compliance with the provisions of the law protecting policy holders, but to insure compliance with the tax laws of the state. It provides that so long as the company so depositing continues solvent and complies with the laws of this state, it shall be permitted by the superintendent of insurance to collect interest and dividends on such deposit, implying that at any time, if the state should be in doubt as to its solvency, it may not only hold the bonds, but hold the interest and dividends to satisfy the claims of the policy holders, and, necessarily, the just claims of the state."

And again:

> "There is nothing in this law exempting as property the bonds of the original deposit from taxation. The company was bound to know that they would be subject to taxation and that, to their full value, they would be made available for the payment of any taxes which the state might lay upon them."

The clause in Section 3660, which the court relies on, is parenthetical in its nature, and reads as follows:

> "So long as the company so depositing continues solvent and complies with the laws of this state, it shall be permitted by the superintendent to collect the interest or dividends on such deposits."

The section forms a part of Title II of the Revised Statutes of Ohio, the whole of which title is devoted to the creation and regulation of corporations. From the location of the section in the statutes, the "laws" referred to would naturally

mean the various regulations and conditions under which companies of the class complainant belongs to are permitted by the state to do business within her borders. The taxation of property of insurance companies is not included in this title, being in Part I of the Revised Statutes. A fair reading of the statute would indicate that the real object of the clause is to enable the superintendent to retain the interest and dividends where there is any doubt of the solvency of the depositor, and that the possible liability of such interest and dividends for obligations for taxes was not within the intent of the Legislature. This more clearly appears by a perusal of the rest of the statute. The deposit is therein limited to be "for the benefit and security of policy holders residing in this state." There is no provision in the law that the principal sum shall be held for any other purpose, and under the law, when a company withdraws from the state, the superintendent of insurance, upon being satisfied that there are no *policy obligations* outstanding in the hands of citizens of the state, is required immediately to release the deposit. If the intention of the Legislature was such as is ascribed to it by the learned Judge in the court below it is fair to assume that the release of these securities would not have been authorized until a further showing that the obligation for taxes due the state or any county thereof had been fully satisfied.

Suppose, for the sake of argument, that the learned Judge is correct in his statement—that the bonds are on deposit to insure compliance with the tax laws of the state; that the company was bound to know the bonds formerly on deposit were subject to taxation; and that to their full value these bonds would be available for the payment of any taxes the state might levy with respect to the former bonds. Do these suppositions assist in determining the validity of an attempt to distrain the other securities now on deposit? Among the laws, which the complainant was bound to know, on the assumption made, was that the state had power to tax bonds found within

her borders, but no power to impose a personal obligation for these taxes upon a non-resident. It was further bound to know that Ohio, by her laws, had elected not to tax personalty as such, until it was actually seized.

If there had been a seizure of the municipal securities by the proper officers and afterwards a substitution for them of these United States bonds the case might possibly have been different. There would have been a lien—a charge upon the specific property seized, and by the act of substitution it might be claimed that the lien or charge was in some way transferred to the property substituted.

But that is not the case at bar. The complainant, which was under no personal liability for taxes, received back from the superintendent its bonds with no lien or charge thereon for taxes. The state stood by and contented itself with bringing a civil action against complainant, instead of seizing the bonds themselves and thereby fixing an actual charge upon them.

Wherein has the company failed to comply with the tax laws of Ohio? In not returning the property? The property was not owned or held within the state, and if Section 2744 be construed as undertaking to require non-resident corporations to perform such duty, which necessarily imposes personal liability, it is to that extent void.

The state of Ohio might have, as did the state of Minnesota, in the statute construed by this court in *Bristol* v. *Washington County* (177 U. S., 133), provided that taxes levied with respect to the personal property of non-residents shall be a lien upon *all* the property of such non-residents in the state. Such a law is entirely within the power of a state to pass, and such a lien would undoubtedly attach to the bonds formerly on deposit belonging to complainant and all the rest of complainant's personal property in the state. But the state of Ohio has elected not to do this, and even if this were an oversight it is not within the province of the courts to supply the defect.

IV.

THE MUNICIPAL BONDS BELONGING TO COMPLAINANT FORMERLY ON DEPOSIT IN COLUMBUS HAVING BEEN REMOVED FROM THE STATE ON APRIL 2D, 1903, ELEVEN DAYS PRIOR TO THE DAY PRECEDING THE SECOND MONDAY IN APRIL OF SAID YEAR (APRIL 13TH), NO TAXES CAN BE ASSESSED WITH REFERENCE TO SUCH BONDS FOR THE YEAR BEGINNING APRIL 13TH, 1903, OR ANY PART THEREOF.

Section 2736, Revised Statutes of Ohio, provides that each person required to list property for taxation shall annually, upon receiving a blank for that purpose, make out and deliver to the assessor, verified by oath, a list of the personal property, moneys, credits, investments in bonds, etc., in his possession or under his control on the day preceding the second Monday in April of that year. In the year 1903, the day preceding the second Monday of April was the 13th of the month. These bonds having been removed from the state on April 2d, 1903, the court below decided that they were not subject to taxes for the year beginning April 13, 1903, or any part of the same.

The contention of our opponents is that the bonds should be taxed for a pro rata proportion of the year, under a provision contained in Section 2737, Revised Statutes of Ohio. This provision is as follows:

> "Such statement" (referring to the list of property required to be made out by the person taxed, verified by his oath, etc., as required by law) "shall truly and distinctly set forth * * *; sixteenth, the monthly average amount or value, for the time he held or controlled the same, within the preceding year, of all moneys, credits, or other effects, within that time invested in, or converted into bonds or other securities of the United States or of this state, not taxed, to the extent he may hold or control such bonds or securities on said day preceding the second Monday of April; and any indebtedness created in the purchase of such bonds or securities shall not be deducted from the credits under the fourteenth item of this section."

The construction of this section was involved in the decision of *Shotwell* v. *Moore*, 129 U. S., 590. The constitutionality of the section had been attacked upon the ground that it indirectly placed a tax upon United States securities. In the majority opinion of this court the reason for the legislation is stated on page 598 as being to prevent the evasion of taxes, made possible by the facility with which negotiable securities and other rights and credits liable to taxation may be exchanged for greenbacks at the time the assessment is made and afterwards replaced in the form in which they had been previously.

The facts of the case at bar show that for a period of years certain securities, supposed theretofore to be non-taxable, were openly on deposit with a state officer at Columbus; that for five years no effort was made to assess a tax against them; that when an effort was finally made by the taxing officers, their right to lay the tax was disputed, and litigation ensued; and that after an adverse decision by a lower court in another case the complainant openly and in due form exercised its prerogative of removing from the state of Ohio the bonds in question, and at the same time substituted for them other securities which were unquestionably non-taxable. There was and is no evasion or trick to defeat the tax laws, but the substitution was an honest election by a non-resident owner to take out of the state securities which it had placed there under the belief that they were non-taxable, and to substitute therefor securities as to the taxability of which there could be no question thereafter. Its right to make this withdrawal and substitution is not questioned, and the total absence of trick or subterfuge or evasion is apparent from the mere statement of facts.

The case at bar, then, does not present a state of facts calling for the application of the law as interpreted by its *spirit* or purpose as they were defined in the above case.

It remains to be discussed whether the case falls within the *letter* of the statute, so as to call for its application irrespective of the motives of the parties.

As appears from the allegations of the bill, the government bonds sought to be distrained, and now on deposit with the superintendent of insurance, were and are not the result of a conversion of the municipal bonds previously on deposit, but were simply substituted for the municipal bonds which were then withdrawn from deposit and removed from the state. The municipal bonds were not sold and the proceeds thereof used to purchase the government bonds. Such a transaction was impossible, even had it been contemplated, the statutory duty of the superintendent of insurance being to retain possession of the first deposit, in his capacity as trustee, until the interests of his *cestuis que trustent* had been protected by the actual deposit with him of the securities which were to take the place of those to be withdrawn. In point of fact, the substituted securities were deposited with the superintendent of insurance before he released the former deposit. There was not, therefore, in fact or in law, either any conversion of the municipal bonds into the government bonds, or any investment of the former in the latter.

The exact language of the statute is that the statement of the person required to list property shall contain—

> "the monthly average amount or value, for the time he held or controlled the same, within the preceding year, of all moneys, credits, and other effects within that time *invested in or converted into* bonds or other securities of the United States or of this state," etc.

The meaning of the verb to "invest," as given in the Century Dictionary, is to "convert into some other form of wealth, usually of a more or less permanent nature, as in the purchase of property or shares, or in loans secured by mortgage," etc. The definition of the verb to "convert," as given by the same authority, is "to change or turn, as into another form or substance; or to change into an equivalent thing; transmute; transform; as to convert grain into spirits; to convert one kind of property into another; to convert bank notes into gold."

It is true that in a limited sense it might be said that the *deposit* of municipal bonds has been changed into a *deposit* of United States bonds; but it can not be said that the one set of bonds has been *converted* into the other set. The municipal bonds were not exchanged into, but for the United States bonds. The plaintiff, prior to effecting the substitution, purchased the United States bonds with assets possessed by it, which were entirely separate from and independent of the municipal bonds, and which assets were not then, and never were, in the State of Ohio. Other assets, whatever they were—bank notes or gold or silver—were converted into or invested in the United States bonds, and these were then substituted for the municipal bonds. The latter were then, by their non-resident owner, taken out of the state. Such substitution does not fall within either the letter or the spirit of said statute, which plainly contemplates an act whereby an owner turns one species of property which is taxable into property which is not taxable, thereby divesting himself of the taxable property; in other words, an ordinary sale or exchange. The case at bar presents an instance in which the owner of both taxable and non-taxable property substituted the non-taxable for the taxable without any change in his legal title to either species of property and without any conversion or investment of one into the other.

It is submitted that neither the spirit nor the letter of Section 2737, Revised Statutes of Ohio, authorized the taxation of the bonds which had been removed, for any portion of the taxing year beginning April 13, 1903.

CONCLUSION.

For these reasons we ask that the decree below be affirmed as to the non-liability of complainant to a personal judgment for the taxes claimed, and as to the non-taxability of the bonds for any part of the year 1903. And we ask for a reversal of

the decree in so far as it held the municipal bonds liable to taxation while on deposit, and in so far as it upheld the right of the state officers to seize for taxes upon such bonds the United States bonds now on deposit in their stead.

As we have shown, the settled construction of the laws by the state authorities for a long period of years was that deposits of this kind were not taxed. That policy has been repeated and confirmed by the legislative declaration above given, that they shall not hereafter be taxed. And it is unjust to the complainant now to have the burden of taxes imposed upon it, all at once, for the long period during which no steps were taken by the State looking to the taxation of bonds in its own possession, at the end of which the sharpened optics of the tax inquisitor showed him a way which does not exist to collect these eight years' taxes in one.

Respectfully submitted,

JUDSON HARMON,
W. O. HENDERSON,
HARTWELL CABELL.

Cincinnati, December, 1904.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY,
APPELLANT,
vs.
WILLIS G. BOWLAND, L. EWING JONES, ARTHUR I. VORYS AND WILLIAM S. MCKINNON,
APPELLEES.
No. 360.

AND

WILLIS G. BOWLAND, L. EWING JONES, ARTHUR I. VORYS AND WILLIAM S. MCKINNON,
APPELLANTS,
vs.
THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY,
APPELLEE.
No. 361.

MOTION TO ADVANCE.

Willis G. Bowland, Treasurer, and L. Ewing Jones, Auditor of Franklin county, Ohio, and Arthur I. Vorys,

Superintendent of Insurance, and William S. McKinnon, Treasurer of the State of Ohio, appellees in cause No. 360, and appellants in cause No. 361, respectfully move the court to advance the above entitled causes on the docket for early hearing.

The Scottish Union and National Insurance Company, a resident of Great Britain, in order to comply with the laws of Ohio regulating the admission of foreign insurance companies to do business within that state, maintained on deposit with the Superintendent of Insurance and Treasurer of the State of Ohio, in Franklin county, $100,000 of municipal bonds during the years 1895 to 1903, inclusive.

Upon the failure of the owners and custodians of said bonds to return the same for taxation, the Auditor of Franklin county listed said $100,000 of municipal bonds for taxation in said county for each of said years 1895 to 1903, inclusive. Said municipal bonds were removed from the State of Ohio on the second day of April, 1903, and bonds of the United States, belonging to said The Scottish Union and National Insurance Company, were substituted therefor, and are now on deposit with Arthur I. Vorys, as Superintendent of Insurance, and William S. McKinnon, as Treasurer of the State of Ohio.

The question involved in case No. 360 is the validity of Section 1095 of the Revised Statutes of Ohio, which authorizes a county treasurer, when taxes are past due and unpaid, to distrain sufficient goods and chattels, if found within his county, belonging to the person charged with such taxes, and to sell the same to pay the taxes so

remaining due; and further the right of Vorys, as Superintendent of Insurance, and McKinnon, as Treasurer of the State of Ohio, to permit the Treasurer in this case to distrain said bonds of the United States so deposited with them by the Scottish Union and National Insurance Company; the claim of appellant being that in so far as said statute attempts to confer upon the treasurer the right to subject to the payment of taxes by distraint, any other personal property within the State of Ohio, belonging to a non-resident of that state, than the particular property on account of which the taxes were originally charged, it violates the Fourteenth Amendment of the Constitution of the United States.

The question involved in case No. 361 is the validity of Section 2859 of the Revised Statutes of Ohio, which authorizes a county treasurer to enforce the collection of any personal taxes which stand charged against any person, as due and unpaid, by civil action against the person for the recovery of such unpaid taxes. The operation of this statute upon non-residents of the state was successfully challenged by the appellee in the court below under the provisions of the Fourteenth Amendment of the Constitution of the United States.

In the Circuit Court the bill of complaint prayed for an injunction, restraining Bowland, as Treasurer, from attempting to collect the taxes assessed against complainant, either by a civil action, under Section 2859, or by distraint under Section 1095 of the Revised Statutes of Ohio, of the bonds of the United States deposited with the Superintendent of Insurance and Treasurer of State, or

any other personal property of complainant, which might be found in Franklin county, and restraining Arthur I. Vorys as Superintendent of Insurance, and William S. McKinnon as Treasurer of the State of Ohio, from delivering the bonds of the United States so deposited with them to said Bowland as Treasurer. Fourteen other insurance companies under a similar state of facts filed bills seeking the same relief, and there are now pending in the Circuit Court sixteen cases in which the Treasurer of Franklin county is temporarily enjoined from proceeding to collect taxes amounting to $180,000, now claimed by said treasurer as due and unpaid. The present case is a test case, which will be decisive of the issues in the remaining sixteen cases.

Upon the hearing of the case at bar, the Circuit Court refused to enjoin the Treasurer from proceeding to distrain said bonds of the United States, or the Superintendent of Insurance and Treasurer of State from delivering said bonds to said Treasurer. The appeal from this decision by the Scottish Union and National Insurance Company is docketed in this court as No. 360. The court perpetually enjoined the Treasurer from proceeding under Section 2859 to collect said taxes by civil action; and from attempting to collect either by distraint or otherwise the taxes levied for the year 1903. The cross appeal on behalf of Willis G. Bowland, L. Ewing Jones, Arthur I. Vorys and William S. McKinnon from this decision is docketed in this court No. 361.

The right of the state to tax said bonds was settled by the decision of the Circuit Court of Appeals in the case

of the Western Assurance Company v. Halliday, 126 Fed. Rep., 257; a petition for a writ of *certiorari* was denied by this court in the same case, March 21, 1904, 193 U. S., p. 673. The right of the state to collect said taxes now before this court in the present cases, is a subsequent step in the same litigation involved in the case of The Western Assurance Company v. Halliday, above noted, and The Western Assurance Company involved in that cause is one of the companies whose bill of complaint is now pending in the Circuit Court awaiting the decision of this cause.

The two statutes to which objection is made under the Fourteenth Amendment of the Constitution of the United States, are the legislative enactments by virtue of which taxes levied upon personal property in the State of Ohio are collected. If the laws enacted within the State of Ohio for enforcing the collection of taxes, legally levied, in their operation upon non-residents, are repugnant to the Federal Constitution, no taxes upon the personal property of such non-residents of the state will ever be paid, and a large portion of the revenues of the state derived from the taxation of personal property will be destroyed. It is important that the power of the several states to levy and collect taxes by summary proceedings be delayed as little as possible by process from courts of federal jurisdiction. In view of the fact that this is a test case, that the questions involved are of general interest, affecting the collection of the public revenues of the State of Ohio, we submit that the case is

one which should be advanced upon the docket and be heard at an early day.

Notice of this motion has been served upon counsel for The Scottish Union and National Insurance Company.

Respectfully submitted,

WADE H. ELLIS,

Attorney General of the State of Ohio, and Counsel for Arthur I. Vorys, as Superintendent of Insurance, and William S. McKinnon, as Treasurer of the State of Ohio.

EDWARD L. TAYLOR, JR.,
AUGUSTUS T. SEYMOUR AND
KARL T. WEBBER,

Counsel for Willis G. Bowland, as Treasurer, and I. Ewing Jones, as Auditor of Franklin County, Ohio.

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Supreme Court of the United States.

OCTOBER TERM, 1904.

The Scottish Union and National Insurance Company,
Appellant,

vs.

Willis G. Bowland, as Treasurer, and L. Ewing Jones, as Auditor of Franklin County, Ohio; Arthur I. Vorys, as Superintendent of Insurance, and William S. McKinnon, as Treasurer of the State of Ohio,
Appellees.

No. 360.

Willis G. Bowland, as Treasurer, and L. Ewing Jones, as Auditor of Franklin County, Ohio, et al.,
Appellants,

vs.

The Scottish Union and National Insurance Company,
Appellee.

No. 361.

Appeals from the Circuit Court of the United States for the Southern District of Ohio.

BRIEF FOR WILLIS G. BOWLAND et al., APPELLEES, IN CAUSE No. 360, AND APPELLANTS IN CAUSE No. 361.

EDWARD L. TAYLOR, Jr.,
AUGUSTUS T. SEYMOUR.
KARL T. WEBER,
THOMAS N. ROSS,
Solicitors for Willis G. Bowland and L. Ewing Jones.

WADE H. ELLIS,
Attorney General of the State of Ohio, Solicitor for Arthur I. Vorys and William S. McKinnon.

(19,460 and 19,461).

Supreme Court of the United States.

OCTOBER TERM, 1904.

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY,

APPELLANT,

vs.

WILLIS G. BOWLAND, AS TREASURER, AND L. EWING JONES, AS AUDITOR OF FRANKLIN COUNTY, OHIO; ARTHUR I. VORYS, AS SUPERINTENDENT OF INSURANCE, AND WILLIAM S. MCKINNON, AS TREASURER OF THE STATE OF OHIO,

APPELLEES.

[No. 360.]

STATEMENT OF THE CASE.

These causes come into this court upon appeal from a decree of the Circuit Court of the United States in a case in which two statutes of the State of Ohio were claimed to be in contravention of the Constitution of the United States. A full statement of the facts in cause No. 360 will make it unnecessary to add anything in reference to cause No. 361. All of the questions involved in the consideration of the appeal of The Scottish Union and National Insur-

ance Company from the decree below will be presented together, leaving for separate consideration at the end of this brief such additional questions as are necessary to be considered by the appeal of Bowland et al. in cause No. 361.

The Scottish Union and National Insurance Company is incorporated under the laws of and is a resident of Great Britain. In order to comply with the laws of the State of Ohio (Section 3660, Revised Statutes, Appendix *a*), regulating the admission of foreign insurance companies to do business within that State, and as one of the conditions to its right to so conduct its business, it deposited and maintained on deposit, with the Superintendent of Insurance, and the Treasurer of the State of Ohio, at the office of said treasurer at Columbus, in Franklin county, Ohio, $100,000 of municipal bonds during the years 1895 to 1903, inclusive. Said bonds were not returned for taxation in the State of Ohio by the owner thereof, or by any one acting for such owner for either of said years 1895 to 1903, inclusive. (Record, p. 3.)

On the ninth day of October, 1900, the Auditor of Franklin county, Ohio, under the provisions of Section 2781*a*, Revised Statutes of Ohio (Appendix *b*), entered upon the tax list of said county in the name of The Scottish Union and National Insurance Company, taxes for and on account of said municipal bonds belonging to said company for each of the years 1895 to 1900, inclusive. On the eleventh day of December, 1903, said auditor entered in the same manner and by the same authority, upon said tax list taxes for and on account of said bonds, for each of the years 1901 to 1903, inclusive. (Record, pp. 4, 5.)

On the second day of April, 1903, said municipal bonds were withdrawn from deposit with the Superintendent of

Insurance and Treasurer of State and in their stead were substituted on said deposit $100,000 of bonds of the United States of America as provided by Sec. 3660, Revised Statutes of Ohio. (Record, p. 2.) The United States bonds so substituted by The Scottish Union and National Insurance Company for said municipal bonds are still on deposit with Arthur I. Vorys, as Superintendent of Insurance, and William S. McKinnon, as Treasurer of the State of Ohio, and are still owned by said company. (Record, p. 4.)

L. Ewing Jones, as Auditor, has certified for collection to Willis G. Bowland, as County Treasurer of Franklin county, Ohio, all of the taxes listed in the name of The Scottish Union and National Insurance Company for said years 1895 to 1903, inclusive. Said Bowland, as Treasurer, acting under Section 1095 of the Revised Statutes of Ohio (Appendix *c*), proceeded to and will collect, unless restrained by order of court, said taxes by distraint against any goods and chattels belonging to The Scottish Union and National Insurance Company found within Franklin county, Ohio. Said Treasurer was about to take sufficient of the bonds of the United States deposited with the Superintendent of Insurance, and Treasurer of the State of Ohio by said company, to pay the taxes remaining due and standing charged in the name of said company upon the duplicate; the Superintendent of Insurance and Treasurer of State were about to deliver sufficient of said bonds to said Bowland, as Treasurer, in obedience to his demand of distraint under said statute. Said Bowland, as Treasurer, was also proceeding under Section 2859 of the Revised Statutes of Ohio (Appendix *d*) to collect said taxes by civil action against said company, and had obtained service under Sec-

tion 3657 of the Revised Statutes of Ohio (Appendix *e*), which required any foreign company desiring to transact business in the State of Ohio to consent to service of process in that State.

It is conceded that the taxes charged upon the list and duplicate can be collected but once, but the Treasurer, unless restrained by law, will put into operation every provision of law enacted by the Legislature of Ohio for such collection until said taxes are ultimately covered into the county treasury.

The bill of complaint filed in the Circuit Court prayed for an injunction restraining Bowland, as Treasurer, from collecting or attempting to collect any of said taxes against complainant, the insurance company, either by a civil action under Section 2859, or by distraint, under Section 1095 of the Revised Statutes of Ohio, of the bonds of the United States deposited with the Superintendent of Insurance and Treasurer of State, or of any other property of complainant which might be found in Franklin county, and restraining Arthur I. Vorys, as Superintendent of Insurance, and William S. McKinnon, as Treasurer of State, from delivering to said Bowland, as Treasurer, said bonds of the United States on deposit with them or any part of them.

The case was submitted upon special demurrers of Bowland, as Treasurer, and Jones, as Auditor, of Franklin county, Ohio (Record, p. 13), and Vorys, as Superintendent of Insurance, and McKinnon, as Treasurer of State (Record, p. 16), to the bill of complaint, said demurrers having been substituted for those shown at pages 9 and 11 of the Record. (Entry, Record, p. 21.) In deciding the case below the Circuit Court sustained the demurrers to so

much and such parts of the bill of complaint as sought to restrain the defendant, Bowland, as Treasurer, from collecting taxes for the years 1895 to 1902, inclusive, by distraint, under the provisions of Section 1095 of the Revised Statutes of Ohio, out of the United States bonds deposited as alleged in the bill, and sought to restrain Vorys, as Superintendent of Insurance, and McKinnon, as Treasurer of the State of Ohio, from surrendering to the defendant, Bowland, as Treasurer of Franklin county, said United States bonds or sufficient of them to pay the taxes for the years 1895 to 1902, inclusive, and the costs of said distraint. The prayer of the bill in that behalf was denied. From this part of the decree, complainant appealed and the appeal is docketed in this court as cause No. 360, October Term, 1904. (Record, p. 21.)

At the same time, the court overruled the demurrers to so much and such parts of the bill of complaint as sought to restrain Bowland, as Treasurer, from collecting or attempting to collect said taxes by civil action under the provisions of Section 2859 of the Revised Statutes of Ohio; and to so much and such part of said bill as sought to restrain Bowland, as Treasurer, from collecting taxes for the year 1903, by distraint or otherwise, and as sought to restrain the Superintendent of Insurance and Treasurer of State from surrendering sufficient of said United States bonds under the threatened distraint to pay said tax charged for said year 1903. From this part of said decree the defendants appealed and their appeal is docketed in this court as cause No. 361, October Term, 1904. (Record, pp. 22, 23.) The assignments of error upon that appeal will be discussed separately at the end of this brief.

At the same time that the taxes complained of in this cause were placed upon the tax list by the Auditor, on account of bonds deposited with the Superintendent of Insurance by The Scottish Union and National Insurance Company, like action was taken in reference to bonds deposited by fourteen other foreign insurance companies, under a similar state of facts. Taxes amounting to $180,000 were placed upon the tax list on this account and a duplicate thereof certified to the Treasurer for collection.

The litigation growing out of the assessment and attempt to collect taxes from these companies has continued during the past four years. Different questions as to the procedure of the officials of Franklin county charged by law with the duty of collecting public revenue have been argued and submitted before the same judge, Judge Thompson, who heard and decided this case, six different times. At the beginning of the litigation, bills in equity were filed by three of the companies questioning the right of the State to tax bonds so deposited by a foreign insurance company. One of these cases was decided against the company and taken on appeal to the Circuit Court of Appeals, where the decree of the Circuit Court was affirmed and the bonds were held to be properly taxable in Ohio. *Western Assurance Company v. Halliday,* 126 Fed. Rep., 257. A petition for a writ of *certiorari* was filed in this court and denied March 21, 1904, 193 U. S., p. 673. Thereafter on the twentieth day of April, 1904, bills of complaint praying for injunctions restraining the collection of said taxes were filed in the Circuit Court by each of the fourteen companies of which the appellant in this cause was one. The present case is practically a subsequent step in the same litigation com-

menced by The Western Assurance Company v. Halliday, as Auditor, noted above, and is a test case, the decree in which will be decisive of most, if not all, of the remaining cases of like nature now pending in the Circuit Court.

On the hearing of this case in the Circuit Court, therefore, the judge before whom it was argued assumed as settled, by the decision in the case of The Western Assurance Company v. Halliday, the proposition that the bonds deposited as required by Section 3660, Revised Statutes of Ohio, had a taxing situs in Ohio, and were properly listed for taxation for the years 1895 to 1902, inclusive. That question was not argued by counsel, although it was properly presented by the pleadings, and the attention of the court was directed particularly to a consideration of the following allegations in the bill:

> That in so far as Section 1095, Revised Statutes of Ohio attempts to give the defendant, Bowland, as County Treasurer, the right and power of collecting said taxes against complainant by distraint, of the goods and chattels belonging to the complainant, even if the same be found in Franklin county, it is unconstitutional and void, and any effort on the part of said Bowland, as Treasurer, to distrain said bonds of the United States, or other personal property of complainant, and any effort on the part of Arthur I. Vorys, and William S. McKinnon, or either of them to deliver to said Bowland, as Treasurer, either upon his demand, or otherwise, the said bonds of the United States, or any of them, deposited with the Superintendent of Insurance, would be without due process of law and in violation of the Fourteenth Amendment of the Constitution of the United States, and of the treaty rights of the complainant as a subject of Great Britain;

and

> That in so far as Section 2859 of the Revised Satutes of Ohio attempts to give a right to collect said taxes

> from complainant by a personal judgment, it is unconstitutional and void, and any attempt on the part of appellant, as Treasurer, to collect said taxes against complainant personally would be in violation of the Fourteenth Amendment of the Constitution of the United States and the treaty rights of complainant as a subject of Great Britain.

The right of the State to tax said bonds and the legality of the levy of taxes having been passed upon before by the court below, the question considered in this case related solely to the right of the taxing official to collect the taxes so levied under the laws of Ohio, enacted for enforcing the collection of taxes. The language of the opinion (Record, p. 18), was directed mainly to the statutory proceeding of destraint sought to be enforced by the Treasurer in collecting these taxes. It was not contended that the taxes can be collected more than once, however many methods of collection may be provided by law. The court having refused to restrain the Treasurer from collecting said taxes by distraint, under Section 1095 of the Revised Statutes of Ohio, and taking it for granted that collection would be enforced in that way, was not inclined to pass on the validity of Section 2859, but complying with the wishes of all parties to these cases that every question presented by the pleadings be passed on, held said section invalid so far as it authorized a personal judgment against a non-resident of the State upon a claim for taxes. The court further held that the taxes assessed for 1903 could not be legally levied under Section 2737 (Appendix *f*) because said municipal bonds were not converted into government bonds for the purpose of evading or escaping taxation.

The case was disposed of upon the demurrers to the bill of complaint and being one in which two statutes of the

State of Ohio above mentioned were claimed to be in violation of the Constitution of the United States, appeals were taken by both sides directly to this court.

ARGUMENT.

I.

The bonds deposited with the Superintendent of Insurance by Foreign Insurance Companies under Section 3660, Revised Statutes of Ohio, have a situs for taxation in Ohio, and were properly listed for taxation in Franklin County.

It is alleged in the bill of complaint (Record, p. 5), that

> "Said municipal bonds were not taxable in said Franklin county during the years 1895 to 1903, inclusive, or any of such years under any law of the State of Ohio";

and in the third assignment of error (Record, p. 26), it is claimed that

> "Said Circuit Court erred in finding, ordering, adjudging and decreeing that the said pretended taxes as alleged in the bill of complaint which were levied for the years 1895 to 1902, inclusive, were legally levied for each of said years upon said municipal bonds as alleged in the bill."

Although the question as to the right of the State to tax said bonds and the legality of the tax levy, thus made on the record, was not urged before the Circuit Court at the time the case was argued and decided, because that question had been decided by the same judge, upon a like state of facts, in the case of The Western Assurance Company v. Halliday, 110 Fed. Rep., 259, affirmed by the Circuit Court

of Appeals, 126 Fed. Rep., 257, and the decision of that court left undisturbed by this court in an application for a writ of *certiorari,* 193 U. S., 673, the contention of counsel that that decision is not binding in this case, and that the question is now before this court for decision, makes it necessary to include in this argument a brief outline of authorities relied upon by appellees on that point.

(a) Investments in bonds have a taxing situs apart from the domicile of the owner and are taxable where found.

The jurisdiction of Ohio for taxing purposes does not extend to subjects outside of the State. There must be jurisdiction of either property taxed or of its owner. But appellant is a corporation organized under the laws of Great Britain, and its legal domicile, is, therefore, in Great Britain. According to a fiction of the law personal property is regarded as having only the domicile of the owner. It is a well recognized exception to the maxim *mobilia personam sequuntur,* that for purposes of taxation it is entirely competent for the local law to disregard the domicile of the owner and subject to taxation all movables according to their situs.

Municipal bonds are in such a concrete tanglible form that they are subject to taxation where found, irrespective of the domicile of the owner, and a State has the right to tax such bonds whenever they can be localized within its jurisdiction.

State Tax on Foreign Held Bonds, 15 Wall., 300.
Savings Loan Society v. Multnomah Co., 169 U. S., 421.
New Orleans v. Stemple, 175 U. S., 309.
Bristol v. Washington Co., 177 U. S., 133.

Blackstone v. Miller, 188 U. S., 189.
Board of Assessors v. Comptoir National, 191 U. S., 388-403.
Carstairs v. Cochran, 193 U. S., 10.
Lee v. Sturges, 46 Ohio St., 153.
Hubbard v. Brush, 61 Ohio St., 252.

"This exercise of the power of taxation according to both the actual fact of the situs and according to the fiction of the domicile of the owner, though inconsistent and seemingly unjust, does not infringe the constitutional authority of the State, for in the one case it attains its end through its power over the property itself and in the other through its authority over the owner."

Western Assurance Co. v. Halliday, 126 Fed. Rep., 257, 259.

"Where personal property is located within the State, whatever its form, whether evidences of debt, or otherwise, it may be subjected to the State's taxing power, irrespective of the residence of the owner. Thus the State may establish an independent *situs* for taxation of bonds, mortgages and other securities of non-resident owners, located in its jurisdiction."

Judson on Taxation, Section 394.

"It is well settled that bank bills and municipal bonds are in such a concrete tangible form that they are subject to taxation where found, irrespective of the domicile of the owner; are subject to levy and sale on execution, and to seizure and delivery under replevin. Notes and mortgages are of the same nature."

New Orleans v. Stemple, 175 U. S., 309.

"A State has the undoubted power to tax private property, having a situs within its territorial limits, and may require the party in possession of the property to pay the taxes thereon. * * * Statutes sometimes provide that tangible personal property shall be assessed wherever in the State it may be, either to the

owner himself or to the agent or other person having it in charge; and there is no doubt of the right to do this, whether the owner is resident in the State or not."

Carstairs v. Cochran, 193 U. S., 10, 16.

The bonds in question deposited in Franklin county Ohio, with the Superintendent of Insurance, and Treasurer of State, were personal property located within the State, and as such had a situs for taxation in said State, notwithstanding the fact that the domicile of the owner was elsewhere.

(b) Under the Constitution and Statute Law of Ohio, investments in bonds held in that State and owned by non-residents of the State, are taxable within the State.

The Constitution of Ohio in Section 2, of Article XII, provides as folows:

> "Laws shall be passed, taxing by uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise; and also all real and personal property according to its true value in money," and
>
> "That personal property to an amount not exceeding in value two hundred dollars for each individual may, by general laws, be exempt from taxation."

Sec. 3 of Article XIII of the Constitution provides:

> "The property of corporations, now existing or hereafter created, shall forever be subject to taxation the same as property of individuals."

Prior to the adoption of the present Constitution in 1851, the act of the Legislature of 1846 (44 Ohio Law, 85), provided that:

> "All property, whether real or personal within the State, and the moneys and credits of *persons residing*

therein, except such as is hereinafter expressly exempted, shall be subject to taxation; and such property, moneys and credits or the value thereof, shall be entered on the lists of taxable property, for that purpose."

Under that section of the statutes only credits of persons residing within this State were taxable, but by the adoption of the provision of the Constitution of 1851 above quoted, the people of Ohio extended the taxing power of their sovereignty so as not to limit the scope of taxation in Ohio to investments in bonds belonging to persons *residing within the State*. The result is that all investments in bonds, whether belonging to persons residing within the State or elsewhere, if found within its jurisdiction are subject to taxation.

Section 2744 of the Revised Statutes of Ohio (Appendix *g*) provides how corporations shall list their property.

> "The president, secretary, and principal accounting officer of every * * * insurance company * * * excepting banking or other corporations whose taxation is specifically provided for, for whatever purpose they may have been created, whether *incorporated by any law of this State or not*, shall list for taxation, verified by the oath of the person so listing, *all the personal property, which shall be held to include* all such real estate as is necessary to the daily operations of the company, moneys and credits in such company or corporations, within the State, at the actual value in money, in the manner following * * *"

Section 2734 of the Revised Statutes of Ohio (Appendix *h*) provides that:

> "Every person of full age and sound mind shall list the personal property of which he is the owner, and all moneys in his possession * * * controlled by him, as agent or attorney, on account of any other

person or persons, company or corporation whatsoever," etc., and farther down in the section,

"The property * * * of every company, firm, or corporation, by the president or principal accounting officer, partner or agent thereof, and all surplus or undivided profits held by any society for savings or bank having no capital stock, by the president or principal accounting officer."

Section 2735 of the Revised Statutes (Appendix *i*) provides where personal property shall be listed:

* * * "All personal property, moneys, credits, and investments, except as otherwise specially provided, shall be listed in the township, city, or village in which the person to be charged with taxes thereon may reside at the time of the listing thereof, if such person reside within the county where the same are listed, *and if not, then in the township, city, or village where the property is when listed.*"

Section 2737 of the Revised Statutes (Appendix *f*) provides what property shall be listed and includes the language:

"15th. The amount of all moneys invested in bonds, stocks, joint stock companies, annuities, or otherwise."

Section 2746 of the Revised Statutes (Appendix *k*) provides in whose name property shall be listed:

"Personal property of every description, moneys and credits, investments in bonds, stocks, joint stock companies, or otherwise, shall be listed *in the name of the person who was the owner thereof* on the day preceding the second Monday of April, in each year."

Section 2745 of the Revised Statutes (Appendix *l*) provides for the returns to be made by foreign insurance companies, and provides a system of taxation for such com-

panies which is in addition to all other subjects of taxation provided for by the general statutes.

These various sections of the statutes of Ohio comprise the taxing machinery of the State so far as the returns of the property of corporations for taxation is concerned and it is obvious when considered together that the intent and purpose of the legislation is to subject to taxation every form of personal property having a situs in this State, including such forms of personal property as money, credits, bonds and stocks. If they are owned by a person residing in Ohio, they are subjected to taxation without regard to the place of their deposit or lodgment, but if not owned by a person residing in the State their taxability is made to depend upon their being held in the State by some one residing therein, who holds and controls the same for a non-resident owner as agent or otherwise. In the one case Ohio exercises its power to tax by reason of the presence of the property within the State, and in the other by virtue of the domicile of the owner and the saying *mobilia sequuntur personam*. That this is a proper construction of the Ohio statutes, has been held by the Supreme Court of Ohio in *Lee v. Sturges*, 46 Ohio St., 153 and *Hubbard v. Brush*, 61 Ohio St., 252.

In *Hubbard v. Brush*, cited above, the case turned upon the question as to whether the credits of a foreign corporation doing business in Ohio were taxable in that State. The syllabus of the case, which is the authoratative part of the decision under the rule of the Ohio court, reads as follows:

> "Choses in action, whether book accounts, promissory notes, or the like, of foreign corporations that are kept in this State and arise out of the corporate business transacted here, are subject to taxation under the provisions of Section 2744, Revised Statutes."

It was contended in that case that the corporation was one created by the law of another State and that its intangible personalty such as book accounts, notes, etc., had no situs except that of the domicile of the corporation Judge Bradbury in referring to this, said on p. 263:

> "Does that situs for all purposes adhere to the corporate residence, or may choses in action, having the relation, connection and situation in which these were found, be held to possess such a situs in this State as will clothe the State with jurisdiction over them for taxation? The State attempts by Section 2744, Revised Statutes, to assert and exercise such power or jurisdiction. * * * We perceive no reason for denying to the State the power asserted by this section. If men choose to resort to another State or country for authority to organize a corporation for the purpose of engaging in business in this State, or if that was not their original purpose, choose afterwards to plant themselves herein, and in either case transact the corporate business and hold the corporate property wholly within our borders, and enjoy the protection of our laws, it is only just and reasonable that its property should be subject to taxation herein as fully as if its organization had been effected under our own laws, and the right of taxation should not be defeated nor limited upon the ground that for some other purpose the situs of a part of its property should be regarded as being in the State or country where the corporation was organized.
>
> "Where foreign corporations voluntarily bring their property and business into this State to avail themselves of advantages found here which they believe will enhance the probabilities that the business they intend to pursue will be profitable, they should not be heard to complain of laws which tax them as domestic corporations are taxed by the State. We hold, therefore, that the provisions of Section 2744, which make it the duty of foreign corporations to list for taxation in this State, their choses in action where they are held within this State and grow out of the business they conduct

herein, is a valid exercise of the taxing powers vested in the State. This holding finds support in many adjudications, among which may be cited *The People ex rel. v. The Village of Ogdensburg*, 48 N. Y., 390; *Redmond v. Commissioner*, 87 N. Car., 122; *State ex rel Taylor, Adm'r., v. St. Louis County Court*, 47 Mo., 594."

In speaking of Section 2 of Article XII of the Constitution, in the case of *Lee v. Sturges*, 46 Ohio St., 153, Judge Spear says (p. 159):

> "It is clear that the purpose of Section 1 is to tax *all* investments in stocks held within the State. This we are bound to assume, for every presumption is in favor of that construction of the law which gives effect to the requirement of the section of the Constitution referred to, and we are forced to the conclusion that the General Assembly, in enacting this law, intended, so far as the complex nature of human business affairs should make it practicable, to include within the taxing provision *all* property within the State," etc.

It has been claimed by our opponents that the Supreme Court of Ohio has announced decisions inconsistent with the right of the State to tax the bonds in question, citing the cases of *Worthington v. Sebastian*, 25 Ohio St., 1, and *Grant v. Jones*, 39 Ohio St., 506. In Grant v. Jones, it was sought to subject to taxation certain mortgage notes for money loaned in Ohio and secured by Ohio land mortgages. The notes were made to a peddler who had no domicile in Ohio, but occasionally came into the State in pursuit of his avocation, who on such trips put out his accumulations in loans and collected his interest. It was plainly a case where neither creditor nor his notes had a status in Ohio. A quotation from the opinion in that case is made use of as follows (p. 514):

> "Our statute clearly adopts that rule. Whenever the person holding such choses in action resides in Ohio, he must list for taxation such credits, whether he holds them as owner, guardian, trustee or agent. If they are held within the State in either capacity they are within the jurisdiction of the State for purposes of taxation. If they are not so held, but are owned and held by a non-resident, they are not subject to taxation."

The right to tax in that case rested upon the claim of the State that Patrick Grant, the plaintiff, was a resident of Butler county, Ohio, and it was not claimed that the evidences of debt belonging to Grant were likewise within said township, except by virtue of his residence therein. The dictum above quoted from the decision in that case therefore, is not authoritative, and the language used was not intended to support the proposition for which our opponents contend.

The case of *Worthington v. Sebastian*, 25 Ohio St., 1, is authority simply for the proposition that investments in bonds and stocks of foreign corporations owned by residents of Ohio, are taxable in Ohio; but that investments in bonds owned by persons not residents in Ohio, are not taxable in such State, is by no means a logical corollary of that proposition.

In the foregoing argument we have used with freedom the language of the learned judge who delivered the opinion in the case of *The Western Assurance Company of Toronto v. Halliday et al.*, 126 Fed. Rep., 257, and we quote further from that opinion, the following language on page 265:

> "We are unable to find that the words 'personal property' as used in Section 2744, are used in so restricted a sense as to exclude from taxation such tangible personal property as municipal securities which represent

the capital stock of a foreign insurance company lodged within the State for the security of Ohio policy holders. The construction we reach is consistent with the policy of the State as indicated by the constitutional provision requiring the equal taxation of all property within its jurisdiction, and it also meets the reasonable requirement that all property within the State which receives the benefits and protection of government should share in the burdens of government. We are the more content with this conclusion when we consider that the construction contended for would apply equally to domestic insurance companies required to list their property under this same section of the statutes, such companies are required by Sections 3634, 3637, 3640, Revised Statutes, to invest their capital in certain classes of bonds. If foreign insurance companies are not required to list bonds held by them in the State, neither are such domestic companies. In such case the exemption extended to the shares in domestic companies, whose capital stock is taxed in the name of such companies, by Section 2646, would be lost."

And again, on p. 266:

"The bonds are taxable, and in default of such return the Auditor of Franklin county was right in assessing them as wrongly omitted. Inasmuch as this company has no general office in Ohio, but conducted its business through local agents, each under direction of its home office, these bonds were properly assessed where found."

The taxation of bonds deposited by foreign corporations with the State Treasurer has been under consideration in the case of *Nelson A. Sims v. Catherina Best et al.*, 25 Ohio Circuits Decisions, p. 149. It was decided in that case:

"The Treasurer of State is not a trustee or owner of the bonds and securities deposited with him by a foreign investment company under Section 3821 *r*, Revised Statutes, as a condition precedent to doing business in this State, although they may be applied to

> the payment of corporate debts at the instance of creditors. Hence, as the bonds and securities so deposited remain the property of the corporation, they must be listed for taxation by it under Section 2735, Revised Statutes, in the county within the State where it has its main office and principal place of business."

The decision in this case was affirmed by the Supreme Court of Ohio, without report, under the title of *Heintz et al. Rec'rs v. Cameron et al.*, 70 Ohio St., 491. Heintz et al. were appointed receivers of the Interstate Savings Investment Company, and brought suit against Cameron, as Treasurer of State, to subject bonds, deposited with him under Section 3821r, Revised Statutes of Ohio, to the payment of claims of creditors. Sims, as Treasurer of Franklin county, filed a cross-petition for taxes levied on account of said bonds having a taxing situs in Franklin county. The decision of the case was reported in the Circuit Court of Ohio under the title of Sims, Treas., v. Catherina Best et al., but the title in the Supreme Court of Ohio is Heintz et al. v. Cameron et al.

In that case the Interstate Savings Investment Company was a corporation organized under the laws of the State of West Virginia. Its main office and principal place of business was in fact and by the terms of its incorporation in Cincinnati, Hamilton county, Ohio. It was admitted that the bonds were taxable in Ohio. The only point raised in the courts was whether the bonds should be returned for taxation by the company at its home office in Hamilton county, or in the county where the safe of the Treasurer of the State was and where the bonds were required to be kept, to wit, Franklin county. It was decided on the authority of *Pelton v. Transportation Company*, 37 Ohio

St., 450, that the residence of the Interstate Savings and Investment Company was its main office within the State of Ohio, in Hamilton county, and that the bonds should have been returned by the owner thereof in that county.

In the case at bar, however, the non-resident corporation has no principal office within the State of Ohio, but on the other hand, its chief office in the United States is in the city of Hartford, State of Connecticut, from which office it conducts all its business in the State of Ohio. (Record, p. 2.)

Under Section 2735 of the Revised Statutes (Appendix *i*), The Scottish Union and National Insurance Company was not a resident of the State of Ohio, and the property was required to be listed in the taxing jurisdiction where the property was when listed, or when the same should have been listed. The case of *Sims v. Best* above cited, is authority for the proposition that the bonds silimlar to those deposited by the Scottish Union and National Insurance Company are taxable in Ohio. But from the nature of the facts in the case, it is not authority upon the point as to where the bonds deposited by said insurance company should be returned for taxation.

(c) The nature of the deposit required by Section 3660 of the Revised Statutes of Ohio, as amended February 27, 1894, is not such as to exempt bonds so deposited from taxation within the State.

It is claimed by appellant that the county and municipal bonds authorized to be deposited under Section 3660, Revised Statutes, by the amendment of said section on February 27, 1894 (91 Ohio Laws, p. 40), were to be deposited for the sole purpose of securing the policy holders

of the company depositing such bonds, and that it was not the intention of the legislature that such bonds should be taxable.

Prior to the amendment of said section in 1894, bonds of the United States and of the State of Ohio were permitted to be deposited under said section. By the amendment thereof, municipal bonds of counties and cities in the State of Ohio were permitted to be deposited.

Even if the legislature had intended that the deposit of such bonds should be exempted from taxation within the State, it was beyond its power to pass a law for that purpose. The Constitution of Ohio, in Section 2 of Article XII, requires that all bonds must be taxed by uniform rule and the exemption from taxation of any property brought within the State of Ohio for any purpose whatever would be unconstitutional and void under this section of the Constitution. The bonds so deposited are employed in carrying on the business of these insurance companies. No foreign or domestic fire insurance company will be permitted to carry on business at all within the State until they have this capital stock invested in bonds as a security to the policy holders. Bonds so deposited furnish the security which enables foreign companies to procure business, aside from the fact that the law will not permit them to do business unless they have such capital stock. They would fail to obtain business unless they had a credit which would inspire confidence, and this deposit not only serves the purpose of the law, but in part at least furnishes the credit upon which the business is done.

Bonds were deposited under a similar law with the comptroller of the State of New York by a foreign insurance

company and the question of the right of the State to tax such bonds was raised by the company in the case of *The British Commercial Insurance Company v. Commissioner of Taxes*, 18 Abb. Pr. Rep., 118. In that case it was held:

> "A foreign corporation is liable to taxation on money invested by them in securities (other than United States stocks) which are deposited with the comptroller of the State, as a condition of their being allowed to do business as an insurance company here, as prescribed by the act of 1853. For it is money invested in their business, within the meaning of the act of 1855."

The Court (Ingraham, J.) in its opinion, on p. 130, says:

> "The other question is, whether the plaintiffs are liable to be taxed upon the bonds of the city of Buffalo deposited with the comptroller. There can be no doubt but that those bonds are included under the term personal estate as used in the statute, and the only question which can arise is whether it is property invested in any manner in the business which they carry on. Upon this point there can be but little doubt. The statute prohibits any foreign corporation from carrying on business of life insurance until such company have deposited with the comptroller securities to the amount of $100,000 for the benefit of policy holders of the company. This deposit with the comptroller is necessarily made in connection with the business of the company; without it they can do no business, and it is so deposited as to be security to those who may hold policies of the company. It is, therefore, used in the business of the company, and in fact forms its capital in this State, which is liable to the creditors, and comes within the definition of capital, as defined in the *Mutual Insurance Company v. Supervisors of Erie*, (4 Comstock, 442). These securities so deposited with the comptroller, form the same kind of capital as that of a domestic corporation incorporated for similar purpose, in which the capital is the security for those who deal with it. Neither is actually invested in business and used for that purpose, but both form the basis on which the business is transacted, and the security from

which payment of claims is to be enforced. So far as the assessment was made on the bonds of the city of Buffalo, the same was properly made."

The taxation of bonds deposited under statutes similar to Section 3660, Revised Statutes of Ohio, has been under consideration in a number of cases. Although such statutes are enacted for the protection of policy holders in the several states, yet as respects taxation, such bonds belonging to non-residents of the State are uniformly held to be assessed and taxed within the State where deposited.

The International Life Ins. Soc. v. The Com. of Taxes, 28 Barbour (N. Y.), p. 318.
People v. The Home Ins. Co., 29 Cal., 533.
Simsm v. Best et al., 25 Ohio Circuits Decisions, p. 149, affirmed under title of Heintz et al. Rec'rs v. Cameron et al., 70 Ohio St., 491.

The bonds deposited with the Superintendent of Insurance and Treasurer of the State of Ohio are within the State of Ohio as an investment of that part of the capital of the insurance company employed in carrying on business within the State, and the Constitution of Ohio requires that they shall be subject to taxation.

(d) Section 2745 of the Revised Statutes of Ohio provides a method of taxation for Foreign Insurance Companies in addition to the General Statutes authorizing the levy of taxes, and the Legislature of Ohio had no power to substitute a special method of taxation for the provision of the General Laws relating thereto.

It is contended that the taxation of foreign insurance corporations is specifically provided for by Section 2745 of the Revised Statutes (Appendix *l*), that the provisions of said section constitute an exclusive method of taxation

for foreign insurance companies. In answering this contention, Lurton, J., in the opinion in *Western Assurance Company v. Halliday*, 126 Fed. Rep., p. 266, said:

> "But this is a provision for tax on a business, and is imposed only upon the current premium receipts in the State, less certain commissions, expenses and dividends paid within the State. It is plainly not a property tax at all, and is such a tax as might well be imposed upon foreign companies as a condition of doing business, leaving the question of a property tax to be governed by other and general provisions of law."

Under the Constitution of Ohio, the Legislature did not have the power to exempt any property within the State from the general statutes of the State relating to taxation. The requirement in the Constitution that 'laws shall be passed taxing by uniform rule *all* property' made it impossible for the Legislature to substitute the provisions of Section 2745, Revised Statutes, for those of Section 2744. It is a well settled rule of construction that statutes which strip a government of any portion of its prerogative or gives exemption from the general burden, should receive a strict interpretation.

> 1 *Desty on Taxation*, 180.
> *Yazoo, etc., Ry. Co. v. Thomas*, 132 U. S., 174.
> *New Orleans, etc., Ry. Co. v. New Orleans*, 143 U. S., 192.
> *Chicago B. & K. C. Ry. v. Guffey*, 120 U. S., 569.
> *Phoenix Ins. Co. v. Tennessee*, 161 U. S., 174-177.

> "It being settled law that the language by which a State surrenders its right of taxation, must be clear and unmistakable, a grant by one State to a corporation of another State to exercise a part of its franchise within the limits of the State making the grant, as above said, and laying a tax upon it at the time of the

grant, does not, of itself, preclude a right of further taxation by the same State."

Erie Railway Company v. Pennsylvania, 21 Wall., 492.

"Before any exemption or limitation from State taxation can be admitted the intent of the Legislature to confer the immunity or prescribe the limitations must be clear beyond a reasonable doubt."

The Delaware Railroad Tax, 18 Wall., 206.

If the enactment of Section 2745 (Appendix *I*) was intended as the only method of taxation for foreign insurance companies, it was a deliberate attempt on the part of the Legislature to provide a special mode of taxation in lieu of any other mode, and in effect an express exemption from taxation of all the property of these corporations, other than the gross premium receipts, within the State, or that might thereafter come into the State. But the Legislature of Ohio has no power to exempt any property from taxation that is not specifically exempted by the Constitution.

The conclusion must follow that the bonds specified in the bill of complaint should have been returned for taxation by the owner thereof within the State of Ohio, and that upon the failure of the person required to list the same for taxation, it was the duty of the taxing officers of Franklin county to place said bonds upon the duplicate of said county under the provisions of law enacted for that purpose.

II.

The privilege exercised by appellant under Section 3660, Revised Statutes, to substitute bonds of the United States in exchange for the municipal bonds upon deposit with the Superintendent of Insurance, leaves the bonds so substituted and exchanged subject to all the obligations against the property originally on deposit; and appellant, in obedience to said Statute must comply with all the Laws of the State of Ohio.

Municipal bonds were deposited by The Scottish Union and National Insurance Company with the Superintendent of Insurance and Treasurer of the State of Ohio, and remained on deposit until the second day of April, 1903, when they were wholly withdrawn from such deposit and removed from the State of Ohio. In the place of said municipal bonds appellant substituted $100,000 of bonds of the United States under the provisions of section 3660, Revised Statutes of Ohio (Appendix *a*). Upon application of appellant, and upon receipt from it of said bonds of the United States so exchanged, substituted and deposited in lieu thereof, said Superintendent of Insurance, by virtue of said statute, permitted the withdrawal of said municipal bonds by appellant. (Record, p. 2.).

The appellant, as a foreign insurance company, had no right to do business in the State of Ohio without permission. The State had the right at all times to fix by law the terms and conditions in compliance with which any non-resident might be permitted to do business within its borders. The conditions fixed by law in the State of Ohio, with which appellant was required to comply in order to carry on its busi-

ness within that State, are contained in section 3660 of the Revised Statutes (Appendix *a*).

Appellant proceeded to comply with said statute and deposited the bonds required to be deposited, and commenced and continued to carry on its business in said State during all the years 1895 to 1903, inclusive. It is still doing business within the State. It thereby accepted the terms and conditions imposed by the laws of Ohio upon it in return for this privilege.

Among other things, said section 3660 provides:

> "The stocks and securities so deposited may be exchanged from time to time for other like securities; so long as the company so depositing continues solvent *and complies with the laws of this State* it shall be permitted by the Superintendent to collect the interest or dividends on such deposits."

When appellant decided to come into this State it of necessity accepted the conditions thus imposed upon it by law and virtually agreed to comply with the provisions of the statute and with all the laws of the State of Ohio. It was bound to know that the Constitution of Ohio required that its investments in bonds should be taxed under the general laws of the State. That under such general laws the bonds deposited by it would be required to be listed for taxation each year in the county where such bonds were, in the name of the person who owned them, on the day preceding the second Monday in April. That the president, principal accounting officer or agent would be required to list the same, and on the failure so to do the County Auditor would place them on the tax list and certify the taxes for collection. That it was the duty of the person in whose name taxes were charged upon a tax duplicate

to pay the same, one-half on or before the twentieth of December, and one-half on or before the twentieth of June, after said taxes were assessed. That if said tax remained unpaid when due any property belonging to it within the State, including the bonds themselves, might be taken by the Treasurer to satisfy said tax charge. The insurance company accepted these conditions, was bound to know their requirements, and agreed to comply with all of these laws. The court below, in passing upon this point, said (Record, p. 20):

> "The right of a State to tax the property of non-residents brought within the State is not disputed, and there is nothing in this law exempting as property the bonds of the original deposit from taxation. The company was bound to know that they would be subject to taxation and that, to their full value, they would be made available for the payment of any taxes which the State might lay upon them. The process of distraint is one which the statutes of the State provided and of which the complainant was bound to take notice.
>
> "These bonds are here, within the State, the property of complainant, substituted for the original bonds; and the claim of the complainant is that under the true construction of this statute, they are not subject to distraint, because they are not the bonds upon which the tax was levied. This claim ignores the fact and the purpose of the substitution, and treats the claim of the State as an attempt to levy and collect a tax upon an original deposit of non-taxable bonds."

And on page 19:

> "I think it has been conceded here that the taxes levied upon the bonds originally deposited might be collected by distraint upon these bonds, if they were still within the State; but it is said they are not within the State, but that bonds of the Government of the United States have been substituted in their place

and that they can not be subject to distraint. I think that position is inconsistent with the fair construction of this statute. These government bonds now on deposit are not being taxed, they are not subject to taxation, but an attempt is made to appropriate them to the payment of taxes which were properly levied upon other bonds, for which these bonds were substituted."

The power of the State to impose conditions upon a nonresident seeking to engage in business within its borders is beyond question.

"It is well settled that a State has the power to impose such conditions as it pleases upon foreign corporations seeking to do business within it."

Waters-Pierce Oil Co. v. Texas, 177 U. S., 28.

"The principle that the right of a foreign corporation to engage in business within a State, other than that of its creation, depends solely upon the will of such other State, has long been settled, and many phases of its application have been illustrated by the decisions of this court."

Cooper v. California, 155 U. S., 648, 652.

"While the foreign corporation may sell its goods in the State, or solicit sales in the transaction of interstate commerce, as a right, it can only establish itself in the State and do business therein, as a privilege granted by the State. While the State can not tax the exercise of the right, it can tax the enjoyment of the privilege. As the State has the right to exclude foreign corporations, it necessarily has, involved therein the right to impose conditions on their admission into its jurisdiction."

Judson on Tax., Sec. 158.

It was intended by the legislature of Ohio, in enacting Sections 3660, 3057 and the various statutes relating to the admission of foreign companies, to require such companies

to comply with all the laws of the State of Ohio; that they should be subject to and discharge all obligations which residents of the State were required to discharge. In permitting the stocks and securities deposited with the Superintendent of Insurance to be exchanged for other like securities, it is apparent that the securities so substituted should bear all the obligations which had accrued against the original bonds. It was the duty, therefore, of these companies to pay the taxes charged against them by virtue of the ownership of the municipal bonds during the years 1895 to 1902, inclusive. That duty was one which the State had a right to impose, as a condition precedent to the privilege extended to non-residents of the State in coming within its borders and enjoying the benefits of the State government. There seems to be no reason why the bonds which have been substituted for those originally taxed should not be subject to the obligations which were charged against the municipal bonds while on deposit.

III.

The validity of the Ohio Statutes providing for the collection of taxes as tested by the Federal Constitution.

The taxes assessed on account of the bonds deposited by foreign insurance companies under Section 3660, Revised Statutes, were certified to the Treasurer of Franklin county, Ohio, for collection. In compliance with the requirements of Section 1094, Revised Statutes of Ohio (Appendix *m*), the appellee, Willis G. Bowland, as Treasurer of Franklin county, Ohio, proceeded to collect these taxes. The two statutes by virtue of which the County Treasurer in this

case proceeded in the collection of said taxes are sections 1095 (Appendix *c*) providing for the summary remedy of distraint and section 2859 (Appendix *d*) providing for suit on behalf of the Treasurer and personal judgment for taxes due and unpaid.

The principal objection of appellant to the decree of the Circuit Court is the failure of that court to decide that section 1095 of the Revised Statutes, in so far as it attempts to give the Treasurer, Bowland, the right and power of collecting the taxes against a non-resident of the State by distraint of any property belonging to such non-resident found within his county, is repugnant to the Fourteenth Amendment of the Constitution of the United States.

(a) Summary proceedings in general.

The right of a sovereign government to proceed summarily in the method of collecting dues owing to itself, is as old as the common law, and statutes authorizing the distraint of property to satisfy tax charges which are past due and unpaid, are a part of the taxing machinery of every State in the Union, and of every civilized government.

> "The prompt and unembarrassed collection of taxes is admitted to be so necessary for the support of the government that the collection of taxes on personal property is enforced by distress, or imprisonment, and in no other manner, except in cases where the collector is allowed to maintain an action for them."
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> *Desty on Tax.*, Vol. 2, p. 776.

> "The proceedings for the collection of delinquent taxes by summary process are not obnoxious to the constitutional provision of 'due process of law' * * *

the owner of property so distrained and sold is not thereby deprived of it without due process of law."

Desty on Tax., Vol. 2, p. 750.

"Distraint and seizure of person for the collection of delinquent taxes are also consistent with due process of law. This was illustrated in the decision sustaining the New York statute, according to which the party failing to pay taxes on personalty was subject to distraint and sale of his personal property, but also to a fine for misconduct. A national bank stockholder was prosecuted and convicted under this law, and ordered to stand committed until he paid the amount of the tax with interest and costs, unless the court should see fit sooner to discharge him."

Judson on Tax., Sec. 331.

The Supreme Court of the United States affirmed the judgment in the case which announced the foregoing principle, in the case of Palmer v. McMahon, 133 U. S., p. 660.

"A distress warrant issued by a Solicitor of the Treasury under the act of Congress passed on the fourteenth day of May, 1820, is not inconsistent with the Constitution of the United States.

"Neither is it inconsistent with that part of the Constitution which prohibits a citizen of being deprived of his liberty or property without due process of law.

"By the common law of England and the law of many of the colonies before the revolution and all the States before the formation of the Constitution, a summary process existed for the recovery of debts due to the government."

Murrays' Lessees v. Hoboken Land and Improvement Co., 18 Howard, 272.

Mr. Justice Curtis, in delivering the opinion of the court, said on page 276:

"That the warrant now in question is legal process is not denied. It was issued in conformity with the

act of Congress. But is it 'due process of law'? The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised * * * We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to these settled usages and modes of proceeding existing in the common and statute law of England, before the immigration of our ancestors, which have been shown not to have been unsuited to their civil and political condition by having been acted upon by them after the settlement of this country. We apprehend there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the Crown, and especially those due from receivers of the revenues. It is difficult, at this day, to trace with precision all the proceedings had for these purposes in the earliest ages of the common law. That they were summary and severe, and had been used for purposes of oppression, is inferable from the fact that one chapter of Magna Charta treats of their restraint * * *. Not only was the process of distress in nearly or quite universal use for the collection of taxes, (in legislation of the colonies and provinces and of the States after the Declaration of Independence, and before the formation of the Constitution of the United States) but what was generally termed a warrant of distress, running against the body, goods and chattels of defaulting receivers of public money, was issued to some public officer, to whom was committed the power to ascertain the amount of the default, and by such warrant proceed to collect it."

On page 281 Mr. Justice Curtis continues:

"The power to collect and disburse revenue, and to make all laws which shall be necessary and proper for carrying that power into effect, includes all known and

appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some other part of the constitution. * * * As we have already shown, the means provided by the act of 1820 do not differ in principle from those employed in England from remote antiquity—and in many of the states, so far as we know without objection—for this purpose, at the time the Constitution was formed. It may be added, that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding, and sometimes by systems of fines and penalties, but always in some way observed and yielded to."

Murrays' Lessees v. Hoboken, 18th Howard, 272.

"Congress, in the exercise of its power 'to lay and collect taxes, duties, imposts and excises,' may, to enforce their payment, authorize the distraint and sale of either real or personal property. The owner of the property so distrained and sold is not thereby deprived of it without due process of law."

Springer v. U. S., 102 U. S., 586.

"The power to distrain personal property for the payment of taxes is almost as old as the common law."

Cooley on Tax., p. 302.

"The collection of taxes belongs to the executive branch of the government, and the summary methods for enforcing such collection, sanctioned by long experience, constitute due process of law. The reasonable exercise by the legislature of the right of classification, to provide a summary process for the sale of property for delinquent taxes amounting to less than

the stated amount does not deprive the taxpayer of due process of law."

Judson on Tax., Sec. 330.

(b) Collection of taxes by distraint in Ohio.

(b) *Collection of taxes by distraint in Ohio.*

The law authorizing the collection of taxes by distraint was adopted in Ohio by the first law making body appointed under the Ordinance of 1787 for the government of the territory known as the Northwest Territory, and has been in force in Ohio ever since. This method of proceeding for the collection of taxes has been a usual and ordinary method for that purpose ever since the territory embraced in the State of Ohio has been under the dominion and control of a civilized race. The first law providing for the collection of a personal tax was that adopted under the Ordinance of 1787 and passed August 1, 1792. Chase's Statutes, p. 119-120. It authorized the collector to collect sums assessed against any person, by distraint of the goods and chattels and the imprisonment of such person refusing to discharge the obligation.

By an Act of the first General Assembly of the Northwest Territory, approved December 19, 1799, section 19 provides for the distraint and sale of property for unpaid taxes.

By an Act of the first General Assembly of the State of Ohio, passed April 16, 1803, (1 Ohio Laws, 58), Section 5, recognized the right and duty of the tax collector to proceed to distrain and sell personal property of such persons as shall be delinquent on the first day of October.

By the Act of January 24, 1827, (25 Ohio Laws, p. 25) the office of collector of taxes was abolished and the Treas-

urer or his deputy was required by section 11 of the act to distrain sufficient goods and chattels to pay taxes due and costs that may have accrued. This section of the Act was substantially re-enacted in section 19 of the Act passed March 12, 1831 (29 Ohio Laws, p. 291), which Act remains in force at the present time unamended, and is now embodied in the revision of the statutes under the title "Section 1095. Overdue taxes may be collected by distress."

The remedy for collection of taxes by distraint has therefore been in existence prior to the adoption of the first Constitution of Ohio, and immediately after it was organized as a territory; the statute now sought to be enforced by the Treasurer of Franklin county has stood upon the statute books since 1831 without amendment or repeal; no court during the past one hundred years and more has questioned the validity of this remedy for the collection of State revenues.

It is idle to contend that this statute violates any constitutional inhibition so far as it relates to the taking of propery of persons residing within the State, for delinquent taxes, whether the property taken be the same property as was taxed or otherwise.

What constitutional protection can a non-resident of Ohio invoke, in respect to the operation of section 1095 upon property located within the State, that does not accrue to a citizen of the State?

(c) There is no constitutional objection to the right of a State to collect unpaid taxes, assessed on account of personal property, owned by a non-resident, having a taxing situs within the State, by distraint of any property belonging to such non-resident found within the territorial limits of the State.

As a basis for the relief asked by appellant restraining the County Treasurer from proceeding under Section 1095 (Appendix *c*) of the Revised Statutes of Ohio, it is alleged in the bill of complaint (Record, p. 6):

> "Bowland, as said Treasurer, threatens to and will, unless restrained by this court, distrain, or attempt to distrain, and sell, or attempt to sell, claiming to act in that behalf, under the provisions of said section 1095, the said bonds of the United States belonging to complainant and now on deposit with the Superintendent of Insurance of the State of Ohio, as aforesaid, or other personal property of complainant which may now or hereafter be situate in said Franklin county, or the State of Ohio."

From this statement of the bill it is apparent that no attempt is about to be made to distrain any property belonging to appellant which is not located within Franklin county or the State of Ohio. The bonds belonging to appellant deposited with the Superintendent of Insurance, which the County Treasurer was about to take, were not the same property on account of which the taxes for the years 1895 to 1903, inclusive, were levied, but had been substituted therefor on the second day of April, 1903 (Record, p. 2) under the provisions of section 3660 of the Revised Statutes (Appendix *a*).

The principal question in this case is upon the claim of appellant to the effect that the Constitution of the United States forbids a State to enforce a statute against a non-resident of the State, which authorizes the collection of a tax on property belonging to such non-resident, other than the particular property on account of which the tax was originally levied; that is, if a State taxes the personal property of a non-resident, it must collect the tax out of that personal property and none other.

In answer to this claim it will be found that it rests upon no sound principle of law. If conceded, it would, in practical operation, result in the escape from taxation of all personal property within the State belonging to non-residents, because those taxes, the collection of which the State may not ultimately enforce, will remain unpaid.

The constitutional objection urged under the Fourteenth Amendment is that "due process of law" requires that no State statute may operate beyond the limits of the State.

That to take other property than the particular property on account of which the tax was levied, solely by virtue of the fact that such property belongs to the same person who owned the original property taxed, that person being at all times a non-resident of the State, under a State statute, is in effect to give such statute an extra-territorial operation and is void.

That no State has power to subject a non-resident to an obligation to pay taxes on account of property belonging to such non-resident having a taxing situs within the State that may be enforced by the distraint and sale of other property than the original property taxed, although that property so sought to be distrained is within the jurisdiction of the State.

That although property of a non-resident may have a taxing situs within the State, taxes can not be charged against the owner of such property so that "goods and chattles belonging to the person or persons charged with such tax" may be distrained to pay said tax.

That to enforce an obligation against any property found within the county, belonging to a non-resident, on account of a tax assessed against said non-resident under a statute directing that personal property of every description shall be listed, in the name of the person who was the owner thereof, on the day preceding the second Monday in April of each year, would be to give an extra-territorial effect to such statute and therefore void.

The principles of law relied upon by the complainant to support the foregoing contentions are concisely stated by Mr. Justice Field in the opinion of *Pennoyer v. Neff*, 95 U. S. 714. On page 720 he says:

> "The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established."

Page 722:

> "No State can exercise direct jurisdiction and authority over persons or property without its territory."
>
> "And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decision."

The soundness of these principles is so well established by authority that they must be conceded.

But the learned judge from whose opinion they are quoted places them in their proper relation to other princi-

ples of law, which he stated later in the same opinion, on page 723:

> "But as contracts made in one State may be enforceable only in another State, and property may be held by non-residents, the exercise of the jurisdiction which every State is admitted to possess over persons and property within its own territory, will often affect persons and property without it. To any influence exerted in this way by a State, affecting persons resident or property situated elsewhere, no objection can be justly taken; whilst any direct exertion of authority upon them, in an attempt to give ex-territorial operation to its laws, would be deemed an encroachment upon the independence of the State in which the persons are domiciled or the property is situated, and be resisted as usurpation."
>
> "So the State, through its tribunals, may subject property situated within its limits, owned by non-residents to the payment of demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the State, where the owners are domiciled. Every State owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claim of its citizens. It is in virtue of the State's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the non-resident had no property in the State, there is nothing upon which the tribunals can adjudicate."

The taxation laws of Ohio, so far as they are pertinent to the collection of a tax from a non-resident by distraint, may be summarized as follows:

Section 2744 (Appendix g) provides that:

> "The president, secretary and principal accounting

officer of every * * * insurance company * * * whether incorporated by any law of this State or not, shall list for taxation, verified by the oath of the person so listing, all the personal property * * * moneys and credits of such company or corporation within the State," etc.

Section 2746 (Appendix *k*) provides:

"Personal property of every description, moneys and credits, investments in bonds, stocks, joint stock companies, or otherwise, shall be listed in the name of the person who was the owner thereof on the day preceding the second Monday of April of each year; * * *

Section 2781*a* (Appendix *b*) provides:

"If any person whose duty it is to list property, * * * shall fail to make a return * * * the county auditor shall * * * enter the same on the tax lists in his office, giving a certificate therefor to the county treasurer, who shall collect the same as other taxes" * * *

Section 1091 (Appendix *j*) provides:

"Each person charged with taxes on a tax duplicate, in the hands of the county treasurer, may pay the full amount of such taxes on or before the twentieth day of December, or one-half thereof on or before the twentieth day of December, and the remaining half thereof on or before the twentieth day of June next ensuing."

Section 1094 (Appendix *m*) provides:

"When one-half of the taxes aforesaid, charged against any entry, on a tax duplicate in the hands of a county treasurer, is not paid on or before the twentieth day of December next, after the same has been so charged, or when the remainder of such taxes is not paid on or before the twentieth day of June next thereafter, the county treasurer *shall proceed to collect* the same *by distress or otherwise.*" * * *

Section 1095 (Appendix *c*):

> "When taxes are past due and unpaid, as stated in the preceding section, the county treasurer, or his deputy, may distrain sufficient goods and chattels belonging to the person or persons charged with such taxes, if found within his county, to pay the taxes so remaining due and the costs that have accrued." * * *

The theory of the laws of Ohio taxing personal property, as exhibited by the foregoing quotations, is that such taxes are obligations created by legislative authority and assessed against the owner of property as the measure of his duty to contribute to the support of public burdens in exchange for the protection afforded his property by the government. Although the property is resorted to for the purpose of ascertaining the amount of the tax the individual and not the property must pay the tax.

Desty on Tax., page 7.

The power of a State to tax property of a non-resident is by virtue of jurisdiction over such property. But the meaning of the word "property" indicates the right of a person to own and control things external to such person.

Property is "rightful dominion over external objects; ownership; the unrestricted and exclusive right to a thing."

Black's Law Dict., 253.

> "The right of property is that sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of the right of any other individual in the universe. It consists in the free use, enjoyment, and disposal of all a person's acquisitions, without any control or diminution save only by the laws of the land."

Blackstone's Com., Bk. I, p. 138; Bk. II, pp. 2-15.

The right of a State to tax property, therefore, involves the right to diminish the ownership thereof; and so far as the property of a non-resident is taxed, the rights of its non-resident owner are affected. The right to assess property for taxation carries with it the right of the State to point out a taxpayer. Inanimate objects acquire the status of property only in relation to the ownership thereof, and without an owner such objects lose the attributes of property. To say that property may be taxed is in effect to say that the owner of the things and objects which constitute such property owes an obligation to pay a tax therefor. These inanimate objects are lifeless, can owe no obligation to the State and can be taxed solely on the theory that the owner thereof, in exchange for the benefits and protection of government, must respond in proportion to the value of the things so owned in support of such government.

Under the scheme of taxation adopted in every State in the Union, taxes on account of the ownership of personal property are assessed in the name of and against the owner thereof.

> "The revenue laws usually direct the assessment to be made against the person liable for the taxes, in his name. This requirement is held to be for the benefit and protection of the taxpayer, and mandatory, in the absence of legislation to the contrary; non-compliance therewith by the assessing officers rendering the assessment void."
>
> *Am. & Eng. Enc. of Law*, Vol. 27, 672.

> "The statutes usually contain a general provision requiring the assessments to be made in the name of the owner of the property, if known * * * except as modified by other statutory provisions, strict

compliance with such directions is necessary to a valid assessment."

Am. & Eng. Enc. of Law, Vol. 27, 673.

The legislature of Ohio has adopted this, the only practicable method of assessing personal property, and has required such property to be listed in the name of the person who was the owner thereof on the day preceding the second Monday in April. In this, it has followed the same general scheme of taxation adopted by other States.

"The date at which the presence of personal property in a jurisdiction or taxing district determines its taxability is generally regulated by statute which provides for the day of assessment."

Am. & Eng. Enc. of Law, Vol. 27, 648.

The right to tax property, therefore, involves the power to diminish the owner's right to control said property to the extent of the amount of the tax, and is personal to the owner to that extent. The obligation to pay a tax must be created by legislative authority. It can be created only by laws which operate within the jurisdiction of the State in which they are enacted.

Such laws may affect the property of persons residing beyond the limits of the State, but however absolute the right of the individual in his control of property may be, it is in the nature of that right that it must bear a portion of the public burdens. The legislature may impose the duty of discharging this obligation upon the person of a non-resident and in the event of his failure so to do may authorize the tax collector of the State to enforce such obligation upon any property so long as it is within the territorial limits of the State. The State may exercise its jurisdiction

over the property of non-residents located within its own territory to discharge an obligation due to itself even though the exercise of that power may affect persons beyond its limits.

The right to so subject property to the payment of a tax charge can only be carried to the extent of such property owned by such non-resident as is within its limits, but so long as no other property *than that located within its jurisdiction* is authorized by statute to be taken such statute can be said to have no extra-territorial effect.

> "Taxes are not debts, but obligations created by legislative authority, to which the personal consent or individual assent of the party charged is not required. They create obligations which it is the duty of the party upon whom they are imposed to discharge."
>
> *Desty on Taxation*, section 6.

> "Taxes are positive acts of government, through its various agents, binding upon the inhabitants, and to the making and enforcing of which their personal consent individually is not reqiured."
>
> *Desty on Tax.*, section 6.

> "Taxes are not founded on contract, but owe their existence to the action of the legislature, and do not depend for validity upon individual assent, but operate *in invitum*. A tax law is a legislative enactment which defines the measure of every man's duty in support of the public burdens, and provides the means of enforcing it."
>
> *Desty on Taxation*, section 6; citing *Philadelphia Ass'n* v. *Wood*, 39 Pa. St., 82.

> "The citizen and property owner owes to the government the duty to pay the taxes assessed against him. It is the duty of persons against whom a tax is levied to pay the same. It is a duty, the failure to perform

which is a fault of the owner; but he is not responsible for steps leading to it. The owner of property liable to taxation is bound to contribute his lawful share to the current expenses of government while engaged in ascertaining the amount which he may be assessed. However absolute the right of the individual may be, it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the legislature."

Desty on Taxation, page 11.

"The tax is imposed on the person of the owner; for though property is resorted to for the purpose of ascertaining the amount of the tax, yet the individual and not the property pays the tax."

Desty on Taxation, page 7; citing *Green v. Craft*, 28 Miss., 70; *Rundall v. Lakey*, 40 N. Y., 517.

The statement that taxes are not debts is true in the sense that the statutes enacted for the collection of debts are not jointly applicable to the collection of taxes. Taxes may be collected solely by virtue of legislative enactment providing specifically for their collection.

The statement has been made so often that taxes are not debts that the question occurs: 'What are they?' From the foregoing citations it is apparent that the obligation to pay a tax is a much higher obligation than the duty of one citizen to discharge an obligation arising out of a contract with another citizen. As stated by Mr. Justice Brewer in the case of *Florida Central Railway Company v. Reynolds*, 183 U. S., at page 475:

"It must be remembered that 'taxes are not debts in the ordinary sense of that term;' that they are 'the enforced proportional contribution of persons and property, levied by the authority of the State for the support of the government, and for all 'public needs,

(Cooley on Taxation, First Ed., pages 13-1). They are obligations of the highest character, for only as they are discharged is the continued existence of government possible. They are not cancelled and discharged by the failure of duty on the part of any tribunal or officer, legislative or administrative. Payment only discharges the obligation, and until payment the State may proceed, by all proper means, to compel the performance of the obligation."

A claim for taxes is recognized by the laws of every State to be superior to any private claim on account of debt. As was said by the court in the case of *Allen v. Armstrong*, 16 Iowa, 512:

> "It is in the nature of a first and paramount lien; it takes precedence in the settlement of estates, of all other claims and is universally acknowledged to be one of the highest obligations known to our laws."

In the case of *Buck v. Miller*, 147 Ind., page 586, Howard, J., in the opinion, at page 597, said:

> "Taxes are not debts in the ordinary sense of that term but are rather contributions for the support of the body politic; and it is competent for the legislature to provide how such contributions shall be collected."
>
> Citing *Geren v. Gruber*, 26 La., 694; *Cappen v. Hull*, 21 Vt., 152.

The legislature has just as much power to provide the enforcement and collection of taxes which may be due from a non-resident as it has to provide for the collection of debts which may be due to a resident of the State from debtors residing beyond its jurisdiction. A *taxpayer* is just as essential to a valid tax levy as an obligor is to the creation of a valid debt.

> "The general rule is that a non-resident who makes an investment in a State of the Union holds it subject

to all the laws of that State, both present and prospective. His property may therefore be taxed by the State; it may be subjected to attachment and execution in accordance with those laws; his title may be divested under the statute of limitations of the State in which his property is situated; and in other ways his property rights may be affected by State action."

Reno on Non-residents, section 25.

"Each State has the power to authorize the attachment of any property within its limits and jurisdiction, whether the property be owned by a resident, or a non-resident, or a foreign corporation. 'The exercise of this jurisdiction in no respect infringes upon the sovereignty of the State where the owners are domiciled. Every State owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens. It is in virtue of the State's jurisdiction over the property of the non-residents situated within its limits that its tribunals can inquire into that non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the non-resident has no property in the State, there is nothing upon which the tribunals can adjudicate.'"

Reno on Non-residents, section 136.
Citing *Pennoyer v. Neff*, 95 U. S., 714.
Picquet v. Swan, 5 Mason, 35.

In the case of *McGoon v. Scales*, 9 Wall., 23, Mr. Justice Miller, on page 30, said:

"There can be no question of the right of the legislature of Wisconsin to pass such laws as will subject property within her territory, held or owned by non-residents, to the payment of the debts of such owner; and the manner of doing this is also entirely within legislative control, provided it does not violate some of the provisions of the Federal or State Constitution."

"In Georgia, on a motion to dismiss an attachment obtained on the ground that the defendant resided out of the State, it was urged in support of the motion that the attachment was void under the Fourteenth Amendment of the Constitution of the United States; but the court said: 'No one ever dreamed that the attachment laws of the several States, authorizing attachments against non-resident defendants, were violated by the Constitution of the United States. Argument is unnecessary.'"

Drake on Attachments, section 57; citing *Pyrolucite M. Co. v. Ward*, 73 Ga., 491.

"All the States authorize attachments against the property of non-resident debtors. There is a general uniformity in the statutes so far as concerns the right of action with a conservative remedy, against debtors not residing in the State in which the suit is instituted, who have property within it subject to execution for debt. The principle is everywhere recognized that the property is subject to the jurisdiction, though its owner can not be reached by process."

Waples on Attachments, section 32.

We can see no reason why the State has not the same power to provide by law for the discharge of the obligations due to itself in the nature of a tax from the property of a non-resident within its jurisdiction as it has to subject property situated within those limits, owned by a non-resident, to the payments of the demands of its own citizens arising upon a contract. The obligation of a non-resident to pay a debt arising out of a contract in exchange for the value received as a consideration for that contract is no higher or greater than the obligation created by a sovereign government without the consent of the individual, as the measure of his duty to share public expenses in consideration of the protection which it affords his property. A non-resident

can as readily owe the duty to discharge a public obligation in the nature of a tax as he can to pay a private claim. There is no constitutional objection to the right of the State to subject the property of such non-resident, when found within its limits, to the discharge of a valid tax which has been levied, which could not be urged with the same force against an attempt on the part of the State to attach the property of a non-resident to pay the claim of one of its citizens.

> "If it were true that the State has no mode of collecting her taxes except by seizure and sale of the property assessed, it is no less true that she has an absolute right to enforce their payment in that mode."
>
> "If the exercise of this right is illegally thwarted, and obstructed by a delinquent tax collector, she is clearly entitled to some remedy for such a wrong, and it would be passing strange if her own courts, which she so jealously holds open to every citizen for vindication of all legal rights, should be hermetically sealed against herself alone."
>
> *State v. Meyer*, 41 La. Ann., 439.

> "It is not necessary that the property distrained should be that upon which the tax accrued, nor is it material that the property levied on was purchased subsequent to the assessment of taxes."
>
> *Am. & Eng. Enc. of Law*, Vol. 27, p. 791.

In the case of *Hall v. The American Refrigerator Transit Co.*, 24 Col., 291, the average number of refrigerator cars owned by a foreign corporation were taxed. And the plaintiff, as treasurer of Arapahoe county, sought to collect the tax by distraint and sale of the property of the defendant. The Refrigerator Company were using refrigerator cars within the State of Colorado and although each car

was only temporarily in the State at any time in the course of interstate shipments, the court held that the State of Colorado had a right to take the average number of cars, and upheld the right of the treasurer of Arapahoe county to distrain any of the property which might belong to the Refrigerator Company, in order to collect the taxes assessed. In this case, as in the Pullman Palace Car case, the taxing officers were not restricted to distrain the identical cars which happened to be within the State upon the particular date when the taxes were assessed, but might distrain and sell any property belonging to the said company.

Appellant claims that, conceding that these bonds had a taxing situs within the State, collection of said taxes could be enforced out of those bonds alone, and that to enforce payment on other property of appellant within the State would be by virtue of a *personal charge* or debt assessed against the non-resident owner, and that this is forbidden by the Federal Constitution. The only two cases cited to support this view are those of *New York v. McClain*, 170 N. Y., 374, and *Dewey v. Des Moines*, 173, U. S., 193. An analysis of each of these cases serves to show the doctrine for which they are authority.

In the case of *New York v. McClain*, 170 N. Y., 374 McClain was a resident of New Jersey, and owned one hundred and twenty-nine shares of stock in the Standard National Bank of New York City. The board of taxes and assessments had authority, under statutes of the United States and of the State of New York, to tax the stock of a national bank of the City of New York owned by a non-resident. Such a tax was levied in the name of McClain. A suit was brought against McClain to obtain a personal

judgment for the amount of said tax, under a statute providing that the same remedies may be pursued for the collection of said tax "As are now provided by law for enforcing payment of personal taxes against residents." Personal service of summons was obtained on defendant.

It was held that the Board of Taxes and Assessments had no jurisdiction of the person of the defendant, and could not make any assessment against him on account of the ownership of said bank shares which could be made the basis of a personal judgment against him. The general tax law under consideration in that case provided that (p. 380 of the opinion):

> "*All personal property within the State*, whether owned by individuals or corporations, should be liable to taxation, and another statute provided that persons and associations doing business within the State, as merchants, bankers, or otherwise, and not residents of the State, should be assessed and taxed on all sums invested in said business the same as if they were residents, such taxes to be collected *from the property* of the firms, persons or associations to which they severally belong."

The tax could be collected under this law (Laws of New York, 1855, Ch. 37, Sec. 1) from *any* property belonging to the firm, person or association whose property was taxed. No question was raised upon the point as to whether other property belonging to the defendant, McClain, if found within the State of New York, could be taken to satisfy the tax charge, and that question was not decided.

In the case of *Dewey v. Des Moines*, 173 U. S., 193, a resident of Chicago, Illinois, owned lots in Des Moines, Iowa, upon which certain assessments had been levied for the payment of a surface improvement of the street upon

which said lots abutted. No actual notice of the proceedings looking towards such improvement was had upon the non-resident owner. A statute of the State of Iowa provided for a personal liability of the owner of lots to pay the whole assessment levied to pay the cost of the local improvement. A judgment was rendered in favor of the contractor against Dewey, the non-resident, in the Iowa Court, providing for a personal execution to collect any balance remaining unpaid after the sale of the lots. The principle involved in the decision of the case is concisely stated in the opinion on page 203:

> "The principle which renders void a statute providing for the personal liability of a non-resident to pay a tax of this nature is the same which prevents a State from taking jurisdiction through its courts, by virtue of any statute, over a non-resident not served with process within the State, to enforce a mere personal liability, and where no property of the non-resident has been seized or brought under the control of the court. This principle has been frequently decided in this court. One of the leading cases is *Pennoyer v. Neff*, 95 U. S., 714, and many other cases therein cited. * * *
>
> "A judgment without personal service against a non-resident is only good so far as it affects the property which is taken or brought under the control of the court or other tribunal, in an ordinary action to enforce a personal liability, and no jurisdiction is thereby acquired over the person of a non-resident further than respects the property so taken."

These two cases relied upon by appellant are authority at most for the proposition that a citizen of one State can not be cast in a personal judgment, upon a claim for taxes assessed in another State on account of property belonging to him having a taxing situs within such State.

It does not follow that a State statute may not authorize taxes, assessed against a non-resident, to be collected out of any personal property of such non-resident *found within the State.*

The nature of the obligation to pay taxes is recognized by the Federal laws relating to bankruptcy which give preference to taxes, federal and State, over all other obligations; such taxes are paid, in full, out of all property belonging to the estate and not out of the property taxed.

Taxes levied on account of personal property belonging to a resident of New York having a situs for taxation in the State of Minnesota, were held, by virtue of a statute of Minnesota, to be a debt which might be proved against the estate of a non-resident owner and collectible out of other property within the State than the very property taxed.

Bristol v. Washington Co., 177 U. S., 133.

Our opponents say a non-resident can not owe a tax—that a person can not be charged with a tax on account of property held within a foreign State. In the syllabus of the case of Bristol v. Washington County, cited above, the following language is used:

> "The personal property of a citizen of and resident in one State, invested in bonds and mortgages in another State, is subject to taxation in the latter State; and the amount of the tax is a claim against the *property of the person taxed.*"

It would not be claimed that the taxes assessed against Mrs. Bristol could be collected from property owned by her outside of the State of Minnesota, say, in the State of New York. The procedure objected to and under consideration in that case sought only to subject property to the payment

of a tax charge which was in process of administration in the State of Minnesota and within the jurisdiction of that State. Under the decision there announced *any* property belonging to the estate of a non-resident charged with taxes could be sold to pay said taxes.

Counsel for appellant say that the taxes in that case were held to be collectible out of the estate of the decedent by virtue of two statutes of the State of Minnesota: (1) A statute declaring that taxes assessed upon personal property shall be a lien upon the personal property of the person assessed from and after the time the tax books are received by the county treasurer; (2) a statute making a tax a claim against the property which survives the death of the person against whom the tax is levied and remains a claim against his estate.

The Ohio statute, Section 1095 (Appendix *c*), under consideration in the case at bar authorizes taxes standing upon the tax list in the name of the owner of the property taxed, be he resident or non-resident of the State, to be collected by distraint of any goods and chattels belonging to said owner *found within the county*.

The legislative enactments of the State of Minnesota are based upon the same view of the obligation which the owner of property owes towards sharing the burdens of State government on account of property located within that State, as has been adopted by the Legislature of Ohio.

We can see no greater objection from a constitutional standpoint against a statute which authorizes the collection of a tax out of all the personal property found within the county and belonging to a non-resident of the State, than might be urged against a statute which makes such tax a

lien upon all the personal property of such non-resident within such county from and after the time the tax books may be received by the county treasurer. The taxes are assessed in the name of the non-resident owner in Ohio on account of property owned by him on the day preceding the second Monday in April; in Minnesota, on account of property owned by him, on the first day of May (Sec. 1515, R. S. of Minnesota). In Ohio, the treasurer may distrain all property belonging to such non-resident, found within his county, on the twentieth day of December following. In Minnesota, the lien attached to all personal property belonging to such non-resident first Monday in January (Sec. 1562, Statutes of Minnesota). The statute of each State involves the power to diminish the rights of ownership of non-residents over property other than the property in respect to which taxes have been assessed against him.

Nor is a statute authorizing the collection of a tax from all the property of a living person any more objectionable than one which authorizes it to be collected from the estate of a decedent, the person in each case charged with the tax having been a non-resident of the State at the time the tax was levied. The power exercised by the Legislature of Ohio in the enactment of Section 1095, Revised Statutes, is no more objectionable to the Federal Constitution than the power exercised by the Legislature of Minnesota in enacting the two statutes quoted by counsel.

The power of a State to collect taxes in relation to the right of a non-resident, owner of property, is discussed in the opinion of the Bristol case by Mr. Chief Justice Fuller, at page 145:

> "But it is further contended that, as Mrs. Bristol was a non-resident, the power to tax could be exercised

> only as against the very property taxed; that these assessments did not constitute judgments *in personam;* and that judgment against her estate could not, therefore, be rendered upon them. The State statute provided that claims for taxes should be preferred to ordinary debts, and, as has been seen, the Supreme Court has decided that, 'for the purpose of proof and payment out of the estate, a personal tax is a debt.' The court, for that purpose, so treated taxes, but not as being debts in the usual acceptation of the term. The obligation to contribute to the support of government is not dependent on contract, but on the exercise of the public will as demanded by the public welfare."

And of the process of distraint against non-residents, on p. 146, continues:

> "Thus it appears that on the return of the delinquent tax list, the amount of the tax could be collected by distraint of goods and chattels, or by proceedings by attachment and publication, judgment in which would operate on the property taken in attachment, by garnishment or otherwise. There was no want of due process in all this, *for while the non-resident came under the obligation to pay,* appropriate notice and opportunity to contest were afforded. And if a personal action were brought and service obtained, the defendant would not be cut off from any competent defense, as the delinquent list would not necessarily be held conclusive."

This court in the Bristol case takes the view for which we contend now, that the right to collect taxes assessed on account of property belonging to a non-resident having a taxing situs within a State, by any means, including that of distraint, is not objectionable so far as the means used do not extend the operation of a State statute beyond the territorial limits of the State. It also effectually disposes of the claim that a non-resident can not be under any obligation to pay taxes on account of property belonging to him, having

a taxing situs within the State. The whole argument of our adversaries is based upon the proposition that a State can not impose upon a non-resident any obligation in reference to the payment of taxes assessed against his property. The true principle to be deduced from the authorities it seems to us is, that a State can not impose upon a non-resident an obligation to pay taxes, assessed on account of property belonging to such non-resident being within its jurisdiction, which can be enforced beyond the territorial limits of the State.

(d) The power of the State of Ohio to collect taxes upon personal property of all non-residents of the State is at stake in this case.

Personal property is quick to evade a just share of the burden of local taxation at best. In Ohio all property is listed for taxation in the name of the person who was the owner thereof on the day preceding the second Monday of April of each year. Taxes are assessed by the local taxing bodies in June. The tax list is made up and delivered to the Treasurer in October. Taxes are due and payable, one-half on or before December 20, and the remainder on or before June 20 following. Collection of taxes levied on account of the property listed in April can be enforced not earlier than the twentieth day of December following. The ownership of personal property changes frequently and in the nature of things is migratory. If taxes levied on account of personal property can be collected only by a resort to the very property taxed, but a small amount would be covered into the public treasuries in any of the States from taxes upon personal property. If the contention of our op-

ponents is valid, no taxes levied on personal property will be paid in the future by non-residents of Ohio because the collection thereof can not be ultimately enforced. The property owned by a non-resident within the State on the thirteenth day of April can not be identified for the purpose of collecting the taxes from it on and after the twentieth day of December. To say that the taxes can be levied on the property alone and not in the name of the owner thereof is to deprive the taxing machinery of all means of identifying the personal property. In the affairs of commerce, personalty above all other things is identified by its ownership, and to tax personal property in the abstract without reference to its ownership is in effect to exempt it from taxation.

The property of express, telephone and telegraph companies non-residents of the State of Ohio, is assessed for taxation in that State by a board of appraisers and assessors under Section *2778a* of the Revised Statutes. The property of freight line and equipment companies, foreign corporations, is assessed by a board of appraisers and assessors under Section *2780-9* of the Revised Statutes of Ohio. The property of sleeping car companies, non-residents, is assessed for taxation by a board of appraisers and assessors under Section *2780-14* of the Revised Statutes of Ohio. The personal property of railroad companies, non-residents, located within this State, is assessed for taxation by a board of appraisers and assessors under Section *2770, et seq.,* of the Revised Statutes of Ohio.

The constitutionality of the foregoing statutes which authorize the *listing of the personal property* of these various non-resident corporations by boards of assessors and

appraisers has been frequently tested and upheld. *Adams Express Company v. State Auditor*, 165 U. S., 194, and cases there cited.

An examination of these statutes so far as they provide for the collection of taxes so listed discloses the fact that upon failure of said non-resident corporation to pay the taxes assessed, collection can be enforced only under the general provisions of the statutes of Ohio, authorizing the treasurers of the various counties of the State to collect taxes.

Section 2780 provides that the taxes (assessed against these foreign corporations) shall be collected "in the same manner as taxes are levied and collected on other personal property in the taxing district in question."

Sections 2780-11, 2780-16 and 2780-21 provide for the collection of excise taxes as follows:

If the various foreign corporations fail or refuse to pay the taxes assessed, said taxes shall be collected by any means provided by law for the collection of taxes by county treasurers.

The collection of the taxes assessed by these various boards against non-resident corporations doing a tremendous business within the State of Ohio, is enforcible, in the last instance, by proceedings against whatever property can be found by the tax collector within the State of Ohio belonging to such non-resident. If it be true, as contended by appellant, that the statute providing for County Treasurers proceeding against any property belonging to non-residents found within their counties so far as it affects the property of non-residents, is unconstitutional and void, the taxation of the personal property of these foreign corporations doing

business in the State of Ohio, including railroad companies, express companies, sleeping car companies, etc., will be practically destroyed. This court has held that the statutes of Ohio relating to the listing of the property of these non-resident corporations are valid; yet if there is no existing valid legislation in Ohio by virtue of which the taxes levied under such statutes can be ultimately enforced, it is apparent that the effort to tax them must fail. The personal property of railroad companies changes daily from county to county and from State to State. The personal property of express companies changes as rapidly. The personal property of sleeping car companies and freight line companies is just as migratory and not in a single case does the exact personal property on account of which the tax is assessed in April remain within the State until December, the earliest date within which collection of taxes can be enforced. If the taxes can not be enforced, no one will contend that any of these foreign corporations will pay the taxes from a sense of moral duty.

The right of appellant, as Treasurer of Franklin county, to proceed against either the bonds of the United States deposited by The Scottish Union and National Insurance Company with the Superintendent of Insurance of the State of Ohio, or any other personal property belonging to said company found within his county, to pay taxes charged on the tax duplicate of said county in the name of said company, is consistent with the decisions of this court in the cases of *Bristol v. Washington County*, 177 U. S., 133, and *Pullman Palace Car Company v. Pennsylvania*, 141 U. S., p. 18. *Marye v. Baltimore & Ohio Ry. Co.*, 127 U. S., 117.

Mr. Justice Matthews in the opinion, on p. 123, says:

> "If the Baltimore & Ohio Railroad Company is permitted by the State of Virginia to bring into its territory and there habitually to use and employ a portion of its movable personal property, and the railroad company chooses so to do, it would certainly be competent and legitimate for the State to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon other similar property used in the like way by its own citizens. And such a tax might be properly assessed and collected in cases like the present where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used, and collected by distraint upon a portion that might at any time be found."

Marye v. Baltimore & Ohio Ry. Co., 127 U. S., 117.

IV.

The bonds of the United States owned by a non-resident are subject to distraint or attachment to satisfy a charge against the owner thereof.

The point was made in the court below that bonds of the United States were exempt from taxation by any State and exempt from process of a statute enacted for the collection of taxes. The only case cited was that of *McCulough v. Maryland*, 4 Wheaton, 316.

The doctrine of law embodied in the decision in that case was enacted into a statute by Congress, Section 3701, Revised Statutes of the United States.

Under this statute and under the decision of the *McCullough v. Maryland* case, it is conceded that no State has

a right to tax bonds issued by the federal government. But the right of any citizen of the United States or any State to subject a federal bond to the payment of the debts or obligations of the owners of such bonds seems to us to need little argument. It can make no difference to the government of the United States into whose possession and ownership its obligations may come. It can impair no right of the federal government to subject the bonds of the United States owned by The Scottish Union and National Insurance Company to the payment of taxes charged against said company. The means employed by the federal government in executing its constitutional powers could not be limited, impaired or destroyed in the event that its bonds when issued or sold were subject to be taken from the owner thereof upon execution or by the distraint laws of the several States. It matters not to a sovereignty who its creditors may be, so long as no attempt is made to diminish the rights of the government itself, in the obligation issued by it. The change of ownership in bonds issued by the federal government does not in any way affect the powers of such government.

Plumber v. Coler, 178 O. S., 115.

> "It should be observed that property may be exempted both from taxation and from levy and sale upon a common execution and yet be distrainable by statute for unpaid taxes."
>
> *Am. & Eng. Enc. of Law*, Vol. 27, p. 791.

V.

The duty of the County Auditor under Section 2781a, Revised Statutes, to list property omitted or not returned for taxation, is not dependent upon the presence within the State of the property omitted at the time the corrections are made.

The taxes assessed against The Scottish Union and National Insurance Company for the years 1901, 1902 and 1903, were placed upon the tax list by the Auditor on the eleventh day of December, 1903. Said bonds had been removed from the State on the second day of April, 1903. (Record, p. 2.)

Under Section 2781*a* of the Revised Statutes (Appendix *b*) the Auditor was required by law to enter upon the tax lists in his office the true amount of personal property, moneys, credits and investments which ought to have been returned or listed by the owner or his agent for each year, not exceeding five years next preceding the year in which the inquiries and corrections are made, all property omitted or not returned and taxed according to its true value in money.

Under the operation of this statute it was not material whether the property omitted, or not returned for taxation, was or was not in the county at the time the County Auditor was making his inquiries and corrections under said section. The inquiry instituted by such auditor was required to determine the fact as to what property was in the county, or should have been listed by the owner thereof, on the day preceding the second Monday in April. At the time that

such inquiry is instituted by the County Auditor, the statute requires that he list the property *for each year such property has been omitted or not returned for taxation*, not exceeding five years next preceding the date of such inquiry.

The constitutionality of legislation similar to that enacted in Section 2781*a* has been upheld in the cases of *Sturges v. Carter*, 114 U. S., 511-518; *Winona and St. Peter Land Co. v. Minnesota*, 159 U. S., 526; *Weyerhauser v. Minnesota*, 176 U. S., 550; *Gager v. Prout*, 48 Ohio St., 89.

CONCLUSION.

A demurrer was properly sustained to that part of the bill of complaint which sought to restrain the Treasurer from collecting the taxes charged upon the tax list of Franklin county, Ohio, by distraining the bonds belonging to the Scottish Union and National Insurance Company and by it deposited with the Superintendent of Insurance and Treasurer of State.

The bonds so deposited had a taxing situs within the State of Ohio. The State had a right to and did require this non-resident corporation to comply with all the laws of the State as a condition precedent to its being allowed to do business within its limits. Having agreed to the operation of all the laws of the State upon property brought within such State it can not now be heard to complain when the State seeks to enforce the obligation thereby assumed.

The power of a State to collect taxes assessed on account of personal property belonging to a non-resident having a taxing situs within its borders, is not dependent upon the ability of its taxing officers to find the identical property

taxed. Any property belonging to such non-resident if found within the State, may be subject to the payment of such tax.

The Fourteenth Amendment of the Constitution of the United States forbids any State to exercise powers extending beyond its own limits. It was not intended, however, to control the operation of State statutes upon persons or property within the territorial limits of such State. There is no claim that can be based upon the record in this case that the County Treasurer was about to proceed for the collection of the taxes charged in the name of The Scottish Union and National Insurance Company against any property not within his county. The statute under which he assumed to act authorized him to take only property which he found within his county belonging to the person in whose name taxes were charged. Neither the action of Willis G. Bowland, as County Treasurer, of Franklin county, Ohio, nor the statute by virtue of which he assumed to act were repugnant to the provisions of the Federal Constitution.

(19,460 and 19,461).

Supreme Court of the United States.

OCTOBER TERM, 1904.

WILLIS G. BOWLAND, AS TREASURER, AND L. EWING JONES, AS AUDITOR OF FRANKLIN COUNTY, OHIO, ET AL.,
APPELLANTS,

vs.

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY,
APPELLEE.

[No. 361.]

The appeal in cause No. 361, on behalf of Willis G. Bowland, as County Treasurer, L. Ewing Jones et al., was taken from that part of the decision of the court below:

(1) Overruling the demurrer to such parts of the bill of complaint as sought to enjoin the County Treasurer from collecting or attempting to collect the taxes as alleged in the bill, by civil action under the provisions of Section 2859 of the Revised Statutes.

(2) The finding by the court that the taxes assessed for the year 1903 were illegal and void.

I.

The Action of Bowland, as County Treasurer, in instituting a suit against the Scottish Union and National Insurance Company, under Section 2859, Revised Statutes, for the recovery of unpaid taxes, violates no provision of the Federal Constitution.

Although the decision of this branch of the case was not considered important by the court below by reason of the fact that the County Treasurer was allowed to proceed by distraint to collect the taxes charged, it was deemed best by the parties concerned to have the record show a ruling upon every question made by the pleadings. Upon a request to that effect (Record, p. 20) the court held that the County Treasurer could not proceed to collect, by civil action under this statute, taxes against a non-resident of the State.

If the Treasurer is allowed to proceed to collect said taxes under the authority conferred by Section 1095, Revised Statutes, there is no claim that said taxes can be collected more than once, and the question of the right to proceed under Section 2859, in that event, would become unimportant as applied to the rights of the parties to this suit.

The right to bring suit against the foreign insurance company against whom taxes are alleged to have been assessed in this case is based upon the statute of Ohio, Section 3657 (Appendix *c*), which requires every corporation organized under the laws of a foreign government *to consent to be sued, and to be served with summons in this State* as a condition to the right of such corporation to transact any business within the State.

Section 2859 of the Revised Statutes (Appendix *d*) does not of itself authorize a suit against a non-resident except jurisdiction be obtained over such non-resident under the general statutes of the State. The act of the Legislature embodied in Section 2859 imposed no new liability not otherwise provided by law upon non-residents of the State. No judgment could be rendered under said section against any defendant unless the statutes of Ohio relating to the venue of the action and the service of summons were complied with.

The courts of Ohio have always been alert to so construe statutes relating to actions against non-residents of the State as to protect the right of such non-resident and to comply with the requirements of the Federal Constitution. The Supreme Court of Ohio decided that the State Court could acquire no jurisdiction in an action against a non-resident unless he could be found and personally served, except the case be one in which service by publication could be made.

Williams' Admrs. v. Welton's Admr., 28 Ohio St., 451.

Jurisdiction over any defendant that is a foreign corporation can be obtained by a County Treasurer of Ohio in an action brought by virtue of Section 2859 of the Revised Statutes, solely by virtue of the provisions of Section 3657 (Appendix *e*).

In compliance with said Section 3657. The Scottish Union and National Insurance Company agreed to receive a particular mode of service in the State of Ohio and a judgment rendered in an action against it pursuant to the statute under which such agreement was made is as valid as though such corporation had been served personally.

A number of authorities have been cited in this brief (p.) to support the doctrine that a State has the right to prescribe any conditions it may see fit upon a non-resident of the State in return for the privilege allowed such non-resident to do business within its limits. In addition to what was said there we wish to quote the following authorities.

> "A foreign corporation comes into the State of Ohio to do business with its citizens, only with the consent of the State; that consent it may withhold altogether, or it may impose such conditions and restrictions which may appear to it reasonable to secure its citizens from imposition and fraud."
>
> *Paul v. Virginia*, 8 Wall., 168.
> *New York Life Ins. Co. v. Best*, 23 O. S., 105.

> "Upon the acceptance of this or other prescribed conditions such corporations become entitled to prosecute their business in the State—a right which could not be conferred by the law of their creation * * * In case they failed to comply with the prescribed conditions they are forbidden to transact any business of insurance in this State. The right of the State thus wholly to exclude them is well settled and is not denied."
>
> *New York Life Insurance v. Best*, 23 O. S., 105-113.

The true doctrine upon this subject is well stated in the case of Paul v. Virginia, 8 Wall., 168. Mr. Justice Field, in the opinion (page 181) says:

> "Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporations entirely; they may restrict its business to particular localities, or they may exact such security

> for the performance of its contracts with their citizens, as in their judgment will best promote the public interests. The whole matter rests in their discretion."

That the requirement of the appointment of an agent upon whom service may be had is a condition precedent, and that a valid service may be had upon such agent against a non-resident is decided in the case of *The American Express Company v. Johnson*, 17 O. S., 641. And upon the same point see *Railroad Co. v. Harris*, 12 Wall., 65; *ex parte Shallenberger*, 96 U. S., 377; *Doyle v. Continental Insurance Co.*, 94 U. S., 535; *Bromwell v. Railroad Co.*, 18 Blatchford, 243, and *Ben. Franklin Insurance Co. v. Gillet*, 54 Md., 212.

A statute in Ohio, practically like that embodied in Section 3657, Revised Statutes, to which we have called attention above was construed by the Supreme Court of the United States in the case of *Lafayette Insurance Co. v. French*, 18 Howard, 404.

The court said on page 408:

> "Nor do we think the means adopted to effect this object are open to the objection, that it is an attempt improperly to extend jurisdiction of the State beyond its own limits to a person in another State."

The principal authority relied upon by the complainant upon this branch of the argument is the case already discussed by us of *Dewey v. Des Moines*, 173 U. S., 193, by virtue of which it is contended that a non-resident can not be cast in a personal judgment by a State, for taxes levied against his property in the State. The decision in that case does not go to the extent claimed for it. As was stated by this court in the later decision of *Bristol v. Washington County*, 177 U. S., 133:

> "*Dewey v. Des Moines*, 173 U. S., 193, is not to the contrary. What was ruled there was that a citizen of one State can not be cast in a personal judgment in another State on an assessment levied there on real estate for local improvement without service on him, or voluntary appearance, or some action of his amounting to consent to jurisdiction."

In the opinion in the case of *Pennoyer v. Neff*, 95 U. S., 714, cited in the decision of *Dewey v. Des Moines* as a leading case upon the subject, it was stated by Mr. Justice Field, p. 735:

> "Neither do we mean to assert that a State may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the non-residents both within and without the State. As was said by the Court of Exchequer in *Vallee v. Dumergue*, 4 Exch., 290, 'It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have actual notice of them.' See also *The Lafayette Insurance Co. v. French et al.*, 18 How., 404, *and Gillespie v. Commercial Mutual Marine Insurance Co.*, 12 Gray (Mass.), 201."

The requirement of Section 3657 is not limited to actions based upon contracts of insurance, but requires a foreign corporation desiring to transact any business by an agent

in this State "to acknowledge service of process in this State for and in behalf of the company, consenting that service of process, mesne or final, upon any such agent, shall be taken and held to be as valid as if served upon the company according to the laws of this or any other State or country, waiving all claim or right of error by reason of such acknowledgment of service."

An action brought under Section 2859 against a foreign corporation which had consented to service of summons in accordance with the provisions of said statute 3657 would not in any way violate the provisions of the Federal Constitution. For all purposes of a suit under said Section 2859, said foreign corporation has consented to the jurisdiction of the courts of the State of Ohio. The right of the State to require such non-resident to submit to the jurisdiction of the State arising by virtue of such non-resident being permitted to do business within the State of Ohio is unquestioned. Having complied with Section 3657, Revised Statutes, and having agreed to receive service in the manner prescribed therein, service had upon the agent designated is as good as personal service upon the non-resident in its own country. And by complying with said section it has waived the right to object to such service or the jurisdiction of the Ohio courts in an action arising by virtue of the laws of the State of Ohio, and in connection with business done under the protection of said State.

This court upheld the right of the State of Pennsylvania to bring suit in the Court of Common Pleas of one of its counties to recover the amount of a tax levied on account of property owned by a non-resident of the State and resident of the State of Illinois, in the case of *Pullman's Palace Car*

Co. v. Pennsylvania, 141 U. S., 18. In that case the Pullman's Palace Car Company was a corporation of Illinois, having its principal office in Chicago. A tax was levied on account of personal property owned by said company being used in the State of Pennsylvania. The taxes were levied under certain statutes of the State of Pennsylvania, authorizing a tax upon the property of non-resident corporations. A suit was brought by the State of Pennsylvania in the Court of Common Pleas of the county of Dauphin, Pennsylvania, for the amount of taxes so assessed for the years 1870 to 1880, inclusive. Judgment was rendered in favor of the State for the amount of tax, and affirmed by the Supreme Court of the State of Pennsylvania. Pullman's Palace Car Company sued out a writ of error from this court to the Supreme Court of Pennsylvania, and the decision of the Supreme Court of Pennsylvania was affirmed. The point urged in that case was that the action of the State of Pennsylvania in taxing the property of the Pullman's Palace Car Company was an interference with property employed in interestate commerce. The right, however, of the State of Pennsylvania to maintain an action for the recovery of the amount of the tax as a personal claim against the non-resident corporation, on account of taxes levied and assessed upon personal property having a taxing situs within that State, must have been upheld by this court in that case.

II.

The right of a State under Section 2737 to tax bonds which have been exchanged for non-taxable securities prior to the day preceding the second Monday in April for the year subsequent to the time such bonds are so exchanged.

It was alleged in the bill of complaint (Record, p. 4):

> "Under the statute of Ohio, that only personal property in Ohio, and moneys, credits and investments in bonds, in the possession or under the control of persons residing in Ohio on the twelfth day of April, 1903, were returnable in said State for taxation for the year 1903."

Taxes for the year beginning April 12, 1903, were levied on account of the bonds owned by The Scottish Union and National Insurance Company having been withdrawn from the State on the second day of April, 1903, and in their place non-taxable bonds of the United States having been substituted. The only authority for the levy of taxes on account of such bonds for the year 1903 was that part of Section 2737, Revised Statutes (Appendix *f*), which reads as follows:

> "Such statement (listing property for taxation) shall truly and distinctly set forth * * * 16th: the monthly average amount or value, for the time he held or controlled the same, within the preceding year, of all moneys, credits, or other effects, within that time invested in, or converted into bonds, or other securities of the United States or of this State, not taxed, to the extent he may hold or control such bonds or securities on said day preceding the second Monday in April."

The provisions of law above quoted were under consideration by this court in the case of *Shotwell v. Moore*, 129 U. S., 590, where it was decided that:

> "Section 2737 of the Revised Statutes of Ohio, which requires the taxpayer to return to the assessor, as of the day preceding the second Monday in April of each year, among other things a statement of 'the monthly average, amount or value, for the time he held or controlled the same, within the preceding year, of all moneys, credits, or other effects, within that time invested in, or converted into bonds or other securities of the United States or of this State, not taxed, to the extent he may hold or control such bonds or securities on said day preceding the second Monday of April, and any indebtedness created in the purchase of such bonds or credits shall not be deducted from the credits under the fourteenth item of this section,' does not tax the citizen for the greenbacks or other United States securities which he may have held at any time during the year, but taxes him upon the moneys, credits, or other capital which he has had and used, according to the average monthly amounts so held and is not in conflict with Section 3701 of the Revised Statutes of the United States, exempting the obligations of the United States from taxation under State, municipal or local authority."

On page 600 of the opinion, it is said:

> "Of the right of the State of Ohio to make this provision we have no doubt. Its purpose is not to enable that State to tax the securities of the United States, but to permit it to tax other investments, moneys on hand and on deposit, subject to order, while it combines in the same exemption the securities of the general government and of the State. We know of no principle which forbids the State from taking the whole period of a business year already passed as the best means of ascertaining how much the taxpayer shall be required to pay on property which is admitted to be taxable and how much he shall deduct from the non-taxable securities of the State and of the United States."

The only claim that can be made in favor of the right of the State to tax the bonds of the Insurance Company which had been removed from the State of Ohio prior to the day preceding the second Monday of April for 1903, is that the moneys invested in the bonds so controlled by said Insurance Company prior to the thirteenth of April, 1903, were invested in or converted into bonds of the United States and non-taxable as such when said municipal bonds were removed from the State and such federal bonds substituted in their place.

The question turns entirely upon the construction of that part of Section 2737 of the Revised Statutes of Ohio above quoted and unless the statement of fact in the bill of complaint brings that transaction within the letter of said statute, it must be conceded that such bonds were exempt from taxation for the year 1903.

Respectfully submitted,

EDWARD L. TAYLOR, JR.,
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APPENDIX

(A)

Sec. 3660. [*Certain companies must make deposit.*] A company incorporated by or organized under the laws of a foreign government shall deposit with the superintendent of insurance, for the benefit and security of its policy holders residing in this State, a sum not less than one hundred thousand dollars in stocks or bonds of the United States, or the State of Ohio, or any municipality or county thereof, which shall not be received by the superintendent at a rate above their par value; the stocks and securities so deposited may be exchanged from time to time for other like securities; so long as the company so depositing continues solvent and complies with the laws of this State, it shall be permitted by the superintendent to collect the interest or dividends on such deposits; and for the purposes of this chapter the capital of any foreign company doing fire insurance business in this State shall be deemed to be the aggregate value of its deposits with the insurance or other departments of this State and of the other States of the United States, for the benefit of policy holders in this State or in the United States, and its assets and investments in the United States certified according to the provisions of this chapter; but such assets and investments must be held within the United States and invested in and held by trustees, who must be citizens of the United States, appointed by the board of directors of the company and approved by the insurance commissioner of the State where invested,

for the benefit of the policy holders and creditors in the United States; and the trustees so chosen may take, hold and convey real and personal property for the purpose of the trust, subject to the same restrictions as companies of this State. [91 v. 40; 70 v. 147, § 21; (S. & S. 212).]

(B)

Sec. 2781*a*. [*Action of auditor upon omission of tax return.*] If any person whose duty it is to list property, or to make a return thereof, for taxation to the assessor or county auditor, or to any board, officer, or person, other than a board composed of officers of more than one county shall in any year or years fail to make a return or statement, or if such person shall make a return or statement of only a portion of his taxable property, and fail to make a return as to the remainder thereof, or if he shall fail to return his taxable property or any part thereof, according to the true value thereof in money, as provided by law, the county auditor shall for each year, as to such property omitted and as to property not returned or taxed according to its true value in money, ascertain as near as practicable the true amount of personal property, moneys, credits, and investments that such person ought to have returned or listed, and the true value at which the same should have been taxed in his county for not exceeding the five years next preceding the year in which the inquiries and corrections provided for in this section and in Sections 2781 and 2782 of the Revised Statutes, are made, and multiply the omitted sum or sums by the rate of taxation belonging to said year or years, and accordingly enter the same on the tax lists in his office, giving a certificate therefor to the county treasurer, who shall collect the same as other taxes. The term "personal

property," as used in this section, shall be held to apply to all kinds of omitted property for the taxation of which, for any of the years in which it was omitted, provision has not been made by law. * * * [94 v. 62.]

(C)

Sec. 1095. [*Overdue taxes may be collected by distress.*] When taxes are past due and unpaid, as stated in the preceding section, the county treasurer, or his deputy, may distrain sufficient goods and chattels belonging to the person or persons charged with such taxes, if found within his county, to pay the taxes so remaining due and the costs that have accrued; and shall immediately proceed to advertise the same in three public places in the township where such property was taken, stating the time when, and the place where, such property will be sold; and if the taxes and costs which have accrued thereon, are not paid before the day appointed for such sale, which shall be not less than ten days after the taking of such property, such treasurer, or his deputy, shall proceed to sell such property at public vendue, or so much thereof as will be sufficient to pay said taxes, and the costs of such distress and sale. [29 v. 291, Sec. 19; S. & C. 1586.]

(D)

Sec. 2859. [*Authority of the treasurer; mode of procedure; judgment shall be rendered.*] When any personal taxes, heretofore or hereafter levied, shall stand charged against any person, and the same shall not be paid within the time prescribed by law for the payment of such taxes, the treasurer of such county, in addition to any other remedy provided by law for the collection of such personal taxes, is hereby specially authorized and empowered to

enforce the collection by a civil action in the name of the treasurer of such county against such person for the recovery of such unpaid taxes; and it shall be sufficient, having made proper parties to the suit, for such treasurer to allege in his bill of particulars or petition that the said taxes stand charged upon the said duplicate of said county against such person, that the same are due and unpaid, and that such person is indebted in the amount appearing to be due on said duplicate, and such treasurer shall not be required to set forth in his petition any other or further special matter relating thereto, and said tax duplicate shall be received as prima facie evidence on the trial of said suit of the amount and the validity of such taxes appearing due and unpaid thereon, and of the non-payment of the same, without setting forth in his bill of particulars or petition any other or further special matter relating thereto; and if, on the trial of the action, it shall be found that such person is so indebted, judgment shall be rendered in favor of such treasurer so prosecuting such action as in other cases; and the judgment debtor shall not be entitled to the benefit of the laws for stay of execution or exemption of homestead, or any other property from levy or sale on execution in the enforcement of any such judgment. [74 v. 69, Sec. 1.]

(E)

Sec. 3657. [*The waiver companies must file.*] Any such company desiring to transact any business by an agent in this State, shall file with the superintendent a written instrument, duly signed and sealed, authorizing any agent of the company in this State to acknowledge service of process in this state for and in behalf of the company, consenting that service of process, mesne or final, upon any such agent,

shall be taken and held to be as valid as if served upon the company according to the laws of this or any other State or country, waiving all claim or right of error by reason of such acknowledgment of service, and consenting that suit may be brought against it in the county where the property insured was situate, or where the same was insured, and that service of process made therein by the sheriff of such county, by sending a copy thereof by mail, addressed to the company at the place of its principal office located in the State where it was organized, or, if it is a foreign company, to such company at the place of its principal office in the United States, at least thirty days prior to taking judgment in such suit, shall be as valid as if personally made upon the company according to the laws of this State, or any other State or Government, and that if suit be brought against it after it ceases to do business in this State as aforesaid, and there be no agent of the company in the county in which suit is brought upon whom service of process can be had, service upon it may be had by the sheriff sending a copy thereof, mailed as aforesaid, and within the time aforesaid; but the sheriff's return shall show the time and manner of such service. [75 v. 572, Sec. 20.]

(F)

Sec. 2737. [*What the statement shall contain, and in what order.*] Such statement shall truly and distinctly set forth, first, the number of horses, and the value thereof; second, the number of meat cattle, and the value thereof; third, the number of mules and asses, and the value thereof; fourth, the number of sheep, and the value thereof; fifth, the number of hogs, and the value thereof; sixth, the number of pleasure carriages (of whatever kind), and the value

thereof; seventh, the total value of all articles of personal property, not included in the preceding or succeeding classes; eighth, the number of watches, and the value thereof; ninth, the number of piano fortes and organs, and the value thereof; tenth, the average value of the goods and merchandise, which such person is required to list as a merchant; eleventh, the value of the property which such person is required to list as a banker, broker, or stock-jobber; twelfth, the average value of the materials and manufactured articles which such person is required to list as a manufacturer; thirteenth, moneys on hand or on deposit subject to order; fourteenth, the amount of credits as hereinbefore defined; fifteenth, the amount of all moneys invested in bonds, stocks, joint stock companies, annuities, or otherwise; sixteenth, the monthly average amount or value, for the time he held or controlled the same, within the preceding year, of all moneys, credits, or other effects, within that time invested in, or converted into bonds or other securities of the United States or of this State, not taxed, to the extent he may hold or control such bonds or securities on said day preceding the second Monday of April; and any indebtedness created in the purchase of such bonds or securities shall not be deducted from the credits under the fourteenth item of this section; but the person making such statement may exhibit to the assessor the property covered by the first nine items of this section, and allow the assessor to affix the value thereof, and in such case the oath of the person making the statement shall be in that regard only that he has fully exhibited the property covered by said nine items. [56 v. 175, Sec. 7; 65 v. 38, Sec. 6; S. & C. 1442; S. & S. 758.]

(G)

Sec. 2744. [*Corporations generally; their returns.*] The president, secretary, and principal accounting officer of every canal or slackwater navigation company, turnpike company, plank-road company, bridge company, insurance company, telegraph company, or other joint stock company, except banking, or other corporations whose taxation is specifically provided for, for whatever purpose they may have been created, whether incorporated by any law of this State or not, shall list for taxation, verified by the oath of the person so listing, all the personal property, which shall be held to include all such real estate as is necessary to the daily operations of the company, moneys and credits of such company or corporation within the State, at the actual value in money, in manner following: In all cases return shall be made to the several auditors of the respective counties where such property may be situated, together with a statement of the amount of said property which is situated in each township, village, city, or ward therein. The value of all movable property shall be added to the stationary and fixed property and real estate, and apportioned to such wards, cities, villages, or townships, pro rata, in proportion to the value of the real estate and fixed property in said ward, city, village, or township, and all property so listed shall be subject to and pay the same taxes as other property listed in such ward, city, village, or township. It shall be the duty of the accounting officer aforesaid to make return to the auditor of state during the month of May of each year of the aggregate amount of all property by him returned to the several auditors of the respective counties in which the same may be located. It shall be the duty of the

auditor of each county, on or before the first Monday of May, annually, to furnish the aforesaid president, secretary, principal accounting officer, or agent, the necessary blanks for the purpose of making aforesaid returns; but no neglect or failure on the part of the county auditor to furnish such blanks shall excuse any such president, secretary, principal accountant, or agent, from making the returns within the time specified herein. If the county auditor to whom returns are made is of the opinion that false or incorrect valuations have been made, or that the property of the corporation or association has not been listed at its full value, or that it has not been listed in the location where it properly belongs, or in cases where no return has been made to the county auditor, he is hereby required to proceed to have the same valued and assessed: provided, that nothing in this section shall be so construed as to tax any stock or interest in any joint stock company held by the State. [73 v. 139, § 16; (S. & C. 1446).]

(H)

Sec. 2734. [*Who shall list personal property.*] Every person of full age and sound mind shall list the personal property of which he is the owner, and all moneys in his possession, all moneys invested, loaned or otherwise controlled by him, as agent or attorney, or on account of any other person or persons, company or corporation whatsoever, and all moneys deposited subject to his order, check, or draft, and all credits due or owing from any person or persons, body corporate or politic, whether in or out of such county; all money loaned on pledge or mortgage of real estate, although a deed or other instrument may have been given for the same, if between the parties the same is con-

sidered as security merely; the property of every ward shall be listed by him, of every minor child, idiot, or lunatic having no guardian, by his father, if living; if not, by his mother, if living; and if neither father nor mother be living, by the person having such property in charge; of every wife by her husband, if of sound mind, if not, by herself; of every person for whose benefit property is held in trust, by the trustees; of every estate of a deceased person, by his executor or administrator; of corporations whose assets are in the hands of receivers, by such receivers; of every company, firm, or corporation, by the president or principal accounting officer, partner or agent thereof; and all surplus or undivided profits held by any society for savings or bank having no capital stock, by the president or principal accounting officer. [62 v. 105, Sec. 4; 75 v. 441, Sec. 1; 76 v. 28, Sec. 2; S. & S. 756; S. & C. 1441.]

(I)

Sec. 2735. [*Where personal property shall be listed.*] Every person required to list property on behalf of others shall list the same in the same township, city, or village in which he would be required to list it if such property were his own; but he shall list it separately from his own, specifying in each case the name of the person, estate, company, or corporation, to whom it belongs; all merchants' and manufacturers' stock, and all personal property upon farms shall be listed in the township, city, or village in which the same may be situated; and all other personal property, moneys, credits, and investments, except as otherwise specialy provided, shall be listed in the township, city, or village in which the person to be charged with taxes thereon may reside at the time of the listing thereof, if such person

reside within the county where the same are listed, and if not, then in the township, city, or village where the property is when listed. [62 v. 105, Sec. 4; S. & S. 756.]

(J)

Sec. 1091. [*Taxes: when to be paid.*] Each person charged with taxes on a tax duplicate, in the hands of a county treasurer, may pay the full amount of such taxes on or before the twentieth day of December, or one-half thereof on or before the twentieth day of December, and the remaining half thereof on or before the twentieth day of June next ensuing; but all road taxes so charged, shall be paid prior to the twentieth day of December. [56 v. 101, Sec. 1; S. & C 1475.]

(K)

Sec. 2746. [*In whose name property to be listed; but stock in companies which make return of capital not to be listed by shareholder.*] Personal property of every description, moneys and credits, investments in bonds, stocks, joint stock companies, or otherwise, shall be listed in the name of the person who was the owner thereof on the day preceding the second Monday of April, in each year; but no person shall be required to list for taxation any share or shares of the capital stock of any company, the capital stock of which is taxed in the name of such company. [56 v. 175, Sec. 59; S. & C. 1460.]

(L)

Sec. 2745. [*Returns by foreign insurance companies.*] Every agency of an insurance company incorporated by the authority of any other state or government, shall return to the auditor of each county in which such company does business, or from which it collects premiums on or before

the first day of May, annually, the amount of the gross premium receipts of such agency for the previous calendar year in such counties; provided, however, that in the case of regular companies, wherein policy holders participate in the surplus and earnings of the company, dividends or surplus from previous payments allowed and used in the payment of current premiums, cancellations or surrender values, and commissions paid to the citizens of this state, during the same period for which receipts are reported, shall be deducted from such gross receipts, and the net amount after such deductions shall be the basis of taxation for such companies in the counties, which shall be entered upon the tax list of the proper county, and be subject to the same rate of taxation, for all purposes, that other personal property is subject to at the place where located; and the whole of said tax shall be due and payable on the twentieth day of November next ensuing. And it shall be the duty of the superintendent of insurance, in the month of December, annually, to charge and collect from all such companies such a sum as, added to the sum paid to the county treasuries, will produce an amount equal to two and one-half per cent. on the gross premium receipts of such companies, as shown by their annual statements, under oath, to the insurance department; provided, however, that if, by the laws of any other state, territory or nation, a larger tax than two and one-half per cent. on such gross premium receipts is charged companies organized under the laws of Ohio, then the superintendent of insurance shall charge a like tax upon companies from such state, territory or nation doing business in this state. If any such company refuse to pay said tax, after demand therefor has been made, or if it shall make any false statement of its gross premium receipts, the

superintendent of insurance shall revoke the license of such company to do business in this state. If, at any time, said superintendent has reason to suspect the correctness of the return make (made) of the gross premium receipts of any such company he may, at the expense of the state, make an examination of the books of such company, or of its agents, for the purpose of verifying the same. All taxes collected under the provisions of this section by the superintendent of insurance shall be paid by him, upon the warrant of the auditor, into the general revenue fund of the State. [91 v. 91; 90 v. 201; 86 v. 274; 85 v. 183; Rev. Stat. 1880; 73 v. 139, Sec. 16.] (This section has since been amended by the Legislature of Ohio, but such amendment was passed subsequent to the levy of all taxes involved in this case.)

(M)

Sec. 1094. [*Effect of not paying taxes at times prescribed.*] When one-half of the taxes, as aforesaid, charged against any entry, on a tax duplicate in the hands of a county treasurer, is not paid on or before the twentieth day of December next, after the same has been so charged, or when the remainder of such taxes is not paid on or before the twentieth day of June next thereafter, the county treasurer shall proceed to collect the same by distress or otherwise, together with a penalty of five per centum on the amount of taxes so delinquent, (which penalty shall be for the use of the treasurer as a compensation for such collection); and in all cases where such half of any taxes, other than on real estate, has not been paid on the twentieth day of December, the whole amount of taxes, other than real estate, for the current year, so charged, shall be due and delinquent, and shall be collected in the manner and with the penalty provided in this section. [56 v. 101, Sec. 4; S. & C. 1476.]

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JAMES H. McKENNEY

(19,460 and 19,461).

Supreme Court of the United States.

OCTOBER TERM, 1904.

The Scottish Union and National Insurance Company,
Appellant,

vs.

Willis G. Bowland, as Treasurer, and L. Ewing Jones, as Auditor of Franklin County, Ohio; Arthur I. Vorys, as Superintendent of Insurance, and William S. McKinnon, as Treasurer of the State of Ohio,
Appellees.

No. 360.

Willis G. Bowland, as Treasurer, and L. Ewing Jones, as Auditor of Franklin County, Ohio, et al.,
Appellants,

vs.

The Scottish Union and National Insurance Company,
Appellee.

No. 361.

Appeals from the Circuit Court of the United States for the Southern District of Ohio.

SUPPLEMENTAL BRIEF FOR WILLIS G. BOWLAND et al., APPELLEES, IN CAUSE No. 360, AND APPELLANTS IN CAUSE No. 361.

EDWARD L. TAYLOR, Jr.,
AUGUSTUS T. SEYMOUR.
KARL T. WEBBER,
Of Solicitors for Willis G. Bowland, et al.

(19,460 and 19,461).

Supreme Court of the United States.

OCTOBER TERM, 1904.

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY,

APPELLANT,

vs.

WILLIS G. BOWLAND, AS TREASURER, AND L. EWING JONES, AS AUDITOR OF FRANKLIN COUNTY, OHIO; ARTHUR I. VORYS, AS SUPERINTENDENT OF INSURANCE, AND WILLIAM S. MCKINNON, AS TREASURER OF THE STATE OF OHIO,

APPELLEES.

[No. 360.]

WILLIS G. BOWLAND, AS TREASURER, AND L. EWING JONES, AS AUDITOR OF FRANKLIN COUNTY, OHIO, ET AL.,

APPELLANTS,

vs.

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY,

APPELLEE.

[No. 361.]

SUPPLEMENTAL BRIEF FOR WILLIS G. BOWLAND et al., APPELLEES IN CAUSE No. 360, AND APPELLANTS IN CAUSE No. 361.

A large part of the argument in the brief of counsel for the Scottish Union and National Insurance Company is upon the question whether the State of Ohio, by its consti-

tution and legislative enactments has in fact provided a method for taxing the bonds deposited with the Superintendent of Insurance under Section 3660 of the Revised Statutes. This question has practically been decided by this court in refusing the application of the Western Assurance Company for a writ of *certiorari* to review the decision of the Circuit Court of Appeals for the Sixth Judicial Circuit in the case of the *Western Assurance Company v. Halliday*, 126 Federal Reporter, 257. The decision of this court is noted in the 193 U. S., 673.

Are the Municipal Bonds deposited with the Superintendent of Insurance taxed by the Laws of Ohio?

It is conceded that the decision of *The Western Assurance Company v. Halliday*, 126 Federal Reporter, 257, if correct, is decisive of the first proposition argued by appellant.

Our opponents also concede that municipal securities may be taxed by a State if found within the territorial limits of such State. Their contention is that in the decision of *The Western Assurance Company v. Harliday* case, the court and Judge Lurton in delivering the opinion refused to follow the decisions of the Ohio Supreme Court construing the Constitution and Statutes of Ohio.

It is true that a federal court will follow and be controlled by the decisions of the highest tribunal of a state in reference to the construction of the Constitution or Statutes of such State. Has the Supreme Court of Ohio so construed the Constitution and Statutes of Ohio upon the question of the taxability of municipal securities, owned by a non-resident of the State and yet being held within the

State, as to be inconsistent with the decision of the case of *The Western Assurance Company v. Halliday.* If not, this court will not be controlled by such decisions, but will construe the Statutes of Ohio independent of such decisions.

I.

A Review of the Decisions of the Supreme Court of Ohio relied upon by Appellant.

Counsel for appellant have cited five decisions of the Supreme Court of Ohio as being in point. And in order to determine whether that court has in fact decided that municipal securities, belonging to non-residents of the State, can not be taxed when found within the State, it is necessary to examine each of these decisions and ascertain the exact point for which they are authority.

In the *Exchange Bank v. Hines*, 3 Ohio St., 1, the act of April 13, 1853, was under consideration. It was claimed that Section 10 of that act which provided that:

> "In making up the amount of moneys and credits which any person is required to list for himself, or any other person * * * he shall be allowed to deduct from the gross amount of money and credits the amount of all bona fide debts owing by such person," etc.

The question involved in the case was whether the deductions thus permitted were forbidden by Section 2 of Article XII of the Constitution of 1851. The court decided said section of said act unconstitutional, that the Constitution permits no deduction of liabilities from money and credits.

The question of the right of the State to tax moneys, credits, or investments in bonds was not in issue. The

exemption claimed under Section 10 of the act which allowed debts to be deducted from the amount of moneys and credits which any person was required to return was the only question before the court.

It is remarkable that counsel should extract the sentence quoted in their brief from page 39 of the opinion of Thurman, J., who took occasion in that case to announce his own views, separately from the opinion of the majority of the court, and that the language of Judge Bartley upon the same point in announcing the majority opinion of the court should be ignored.

Judge Thurman, in illustrating the proposition that debts could not be deducted from the moneys and credits required to be taxed by Section 2 of Article XII of the Constitution, took occasion to say that:

> "Even the $200 exemption, authorized by the section, can not be the moneys or credits. It is confined to 'personal property,' and"

Here opposing counsel commence their quotation:

> "although 'personal property' in legal signification, includes moneys and credits, it is apparent that wherever it is employed in this section, it is used in a limited sense and does not include them."

We call attention to this quotation used by opposing counsel that it may be noted, in passing, that the illustration used by the distinguished judge was not the question before the court for decision. The question was not whether the $200 exemption authorized by the section of the Constitution in controversy could be deducted from moneys and credits, but whether all the debts of a person required to return moneys and credits for taxation under said consti-

tutional provision could be deducted from such moneys and credits.

Upon the very point as to the construction of the words "personal property" in this section of the Constitution, the language of Bartley, C. J., in the majority opinion of the court, is a sufficient answer.

It was contended by counsel that the second section of the Constitution referred to specifies two distinct classes of property prescribing a different mode of taxation for each, and not requiring the same rate or burden to be assessed upon each, upon the theory that moneys, credits, investments in bonds, stocks, joint stock companies, etc., are required by said section to be taxed by a uniform rule; but that all other property, both personal and real, is required to be taxed at its true value in money.

In answering this contention, on page 15, Bartley, C. J., said:

> "If this interpretation be correct, the great object of these constitutional provisions, which has been supposed to be equality and fairness in taxation, might be defeated; for it would permit a burden of taxation to be imposed upon a person whose property consisted of real estate, or some kind of personal property, infinitely greater than that which is imposed on a person whose property consists of moneys, credits, bonds, stocks, etc. But it is manifest, from the context and spirit of these provisions, that it was the intention of the Constitution to provide an effectual barrier against a fruitful source of oppression and misrule, arising from inequalities in taxation, by putting an end to all legislative discretion as to *what* should be taxed, *what* should bear the heaviest burden of taxation, and *what* and *how much* should be exempted from taxation."

And further on, p. 17, he says:

"The provision for taxing property '*according to its true value in money,*' in the second clause of the section, applies to all property, both real and personal, of every description, including the enumerated articles of moneys, credits, stocks, etc., mentioned in the first clause. The words, '*all real and personal property,*' in their legal import, include everything which is the subject matter of private property. It is true, that several classes of personal property, consisting of moneys, credits, stocks, etc., are expressly mentioned in the first clause of the section. But this was inserted by way of precaution and certainty, and not with the view of giving them any new and distinctive character, taking them out of the denomination of personal property. Some years ago, moneys, credits, investments in bonds, stocks, joint stock companies, etc., were not subject to taxation in this state. And there has been much controversy, not only as to the propriety, but also touching the right of taxing credits and investments in bonds, stocks, etc. To remove all question of doubt, therefore, on this subject, it was thought proper to require, by an express enumeration, that 'all moneys, credits, investments in bonds, stocks, joint stock companies,' etc., should be taxed. This provision, arising out of abundant caution, was not intended to give these enumerated things any new distinctive classification; nor does it, in fact, exclude them from the denomination of personal property, to which, by their nature and legal incidents, they belong.

* * * * * * * * *

"In the interpretation of legal instruments, words used out of abundant caution, are often to be tolerated at the expense of tautology. The object of the language of the constitution under consideration, was comprehension, not exclusion. The words, '*all real and personal property,*' therefore, in the second clause of this second section, are to be taken in their most comprehensive legal import, including every kind of real and personal property whatsoever, *not excepting* the several classes of personal property expressly mentioned in the first clause of the section. If this inter-

pretation be in any sense liable to the charge of tautology, it certainly is not to that of repugnancy. If this had not been the meaning intended by the Constitution, there would have been added to the words, *'all real and personal property,'* these words, *'other than that above mentioned.'* It is more in harmony with the settled rules of construction, to convict the lawmaker of some inelegancies in rhetoric, and the use of unnecessary words, than to depart from the leading object and intent of the instrument."

Instead of criticising the language of Judge Lurton on page 261 of the opinion in *The Western Assurance Co. v. Halliday* case on account of that judge refusing to give the words "personal property" the limited meaning and sense proposed by Thurman, J., in the opinion of the *Exchange Bank v. Hines* case quoted on page 39 of the decision, it would have been far better for counsel to have noted the opinion of the majority of the court in that case. Judge Thurman took occasion to announce his own private views of the question before the court, but Judge Lurton in the quotation from his opinion on page 261 has certainly adopted a view with reference to the construction of the words "personal property" both as used in the Constitution and in Section 2731 of the Revised Statutes of Ohio, that is consistent with the opinion announced by the majority of the court in the *Exchange Bank v. Hines* case.

If the rule of decision adopted by the Supreme Court of Ohio is to be binding upon this court certainly the decision of a majority of the court will be taken in preference of that announced by a single judge on his own behalf.

The next case in which it is claimed the Supreme Court of Ohio has announced a decision inconsistent with the right of the State to tax these bonds is the case of *Worthington*

v. Sebastian, 25 Ohio St., 1. In that case, Mrs. Worthington, a resident of Hamilton county, Ohio, owned bonds of a railroad company incorporated under the laws of the State of Indiana. It was claimed by her that these bonds were not taxable in Ohio, because they were issued by a corporation of a foreign State, and were taxable only in the State where that corporation resided.

The court decided that the investments in bonds and stocks of a foreign corporation by residents of Ohio are taxable in Ohio.

The question as to whether the investments in bonds being located within the State of Ohio and belonging to non-residents of the State could be taxed in Ohio, was not before the court and certainly was not decided.

The next case cited is that of *Payne v. Watterson*, 37 Ohio St., 121. In that case, Henry B. Payne, a resident of Cuyahoga county, Ohio, was the owner of certain investments in bonds and claimed the right under Section 2730, Revised Statutes of Ohio, to deduct the amount of his indebtedness from such investments in bonds in making his return for taxation. In this case, as in the case of *Exchange Bank v. Hines*, above quoted, the question under consideration was the construction of the statute of Ohio authorizing an *exemption from taxation* by a claim of the right of the taxpayer to deduct his debts from the investments in bonds required by him to be returned for taxation.

It is a familiar rule of construction that when the question under consideration is the right of the citizen to claim

an exemption from taxation, the language of the statute is strictly construed against such exemption.

New Orleans Ry. Co. v. New Orleans, 143 U. S., 192.
Phoenix Ins. Co. v. Tennessee; 161 U. S., 174-177.
The Delaware Railroad Tax, 18 Wall., 206.

On the other hand, when the question under consideration is the right of a sovereign State to tax property, the language of the statute is construed liberally with the purpose of comprehending rather than excluding subjects of taxation. The claim of Payne being that the term "investments in bonds," should be construed by the Supreme Court of Ohio to come within the meaning of the term "credits," as used in that part of Section 2730, which authorized the taxpayer to deduct his debts from the "credits" required to be returned for taxation, the court held against such a construction, and that the term "credits" as used in that connection did not include "investments in bonds."

The court was not considering the sovereign power of the State to tax property under the term "investments in bonds or credits," but was construing a statute authorizing an exemption from taxation, and therefore giving the narrowest meaning possible to the words used in said Section 2730.

In the case of *Grant v. Jones*, 39 Ohio St., 506, we have already analyzed in the brief before filed. Under the facts in that case the State had jurisdiction over neither the owner of the credits nor of the credits themselves.

In the opinion in *Myers v. Scaberger*, 45 Ohio St., 232, it was held that where the creditor resides in another State, a loan of money secured by mortgage on real estate is not subject to taxation in this State, although the securities are

in the hands of an agent residing here, entrusted by the terms of his agency with the collection of the interest and principal when due, and its transmission to the creditor when collected. In that case, the defendant, Mrs. Seaberger, was a resident of Chicago, Illinois. The amount of $17,000 was listed for taxation against her in Knox county, Ohio, on account of loans made for her upon mortgage securities in that county by her uncle acting as her agent and previous to her marriage. After her marriage he continued to act for her in making collections of principal and interest, but not otherwise. He had no power to make investments. He was required by his agency to transmit the collections as soon as made. The uncollected securities, however, remained in his hands for the purposes of the agency as just stated. It was decided that the money so loaned was a credit of a person not residing in this State and not subject to taxation by the State authorities, although the debtor may reside here. The decision turns upon the proposition that a debt should be taxed at the place where it is owned and not at the place where it is owed, and also upon the nature of the agency involved in the case.

In none of the five decisions quoted by counsel for appellant has the question been before the Supreme Court of Ohio as to whether investments in bonds are intangible property, incapable of having a situs for taxation within the State, when owned by a non-resident of the State. And yet that is the question in the case at bar. Until the precise question here involved has been presented to the Supreme Court of Ohio, and decided, this court will follow its own decisions and not be controlled by those of the State court.

It is claimed that the decision of the case of *Nelson A. Sims, Treasurer, v. Best*, 25 Ohio Circuit Dec., p. 149, as

affirmed by the Supreme Court under the title of *Heintz et al. v. Cameron et al.*, 70 Ohio St., 491, holds that investments in bonds are intangible personal property and taxable only at the residence of the owner thereof. In that case bonds deposited by a foreign corporation under a statute similar to Section 3660 of the Revised Statutes were held to be taxable in Ohio. The question as to whether they were so taxed as tangible or intangible personal property was not decided by the court. The decision turned upon and was controlled by the exact language of Section 2735 of the Revised Statutes of Ohio, and as interpreted by the decision of *Pelton v. Transportation Company*, 37 Ohio St., 450.

In Pelton v. Transportation Company, it was held that the principal office of the company is the residence of such corporation within the meaning of Section 2735 of the Revised Statutes of Ohio.

The court in the *Sims v. Best* case decided that the principal office of the Interstate Savings Investment Company, a corporation organized under the laws of West Virginia, having been designated by the terms of its corporation to be in Hamilton county, Ohio, that for the purpose of making returns under Section 2735, it was a resident of Hamilton county, Ohio, and therefore as such resident was required to list all of its property, *tangible* and *intangible* in Hamilton county.

In the case at bar, the Scottish Union and National Insurance Company has no principal office or place of business within the State of Ohio, and therefore all its personal property, moneys, credits and investments in bonds were required to be listed in the township, city or village where the property was when listed.

It is noticeable that the language of Section 2735 here in point and decisive of this case, to wit,

> "*And if not, then in the township, city or village where the property is when listed,*"

is omitted by opposing counsel from the quotation of such section in their brief.

The attempt to torture this decision to support the proposition that municipal bonds have been held by the Supreme Court of Ohio to be intangible personal property and non-taxable except at the residence of the owner, finds no support in the decision rendered by the State Circuit Court.

The right of the State to tax choses in action belonging to foreign corporations doing business within the State of Ohio was upheld in the case of *Hubbard as Treasurer v. Brush*, 61 Ohio St., 252. In that case the Sandusky Portland Cement Company was a corporation organized under the laws of West Virginia. The defendant, Brush, was a resident of Cuyahoga county, and owned certain shares of stock of such corporation and claimed such stock to be exempt from taxation under the latter part of Section 2746 of the Revised Statutes of Ohio, which provides that:

> "No person shall be required to list for taxation any share or shares of the capital stock of any company, the capital stock of which is taxed in the name of such company."

The Sandusky Portland Cement Company had its principal office and place of business and property in Erie county, Ohio, and it was claimed that it listed and paid taxes in that State on all its property. All of its property except its accounts receivable were listed for taxation in the name of said company in Ohio. It was declared in the opinion of the court (p. 261), that if any part of the cor-

porate property is not taxed within this State the owners of shares of its stock who are residents of this State are not exempt by virtue of the provisions of said Section 2746.

The decision of the case turned upon the question as to whether the choses in action of the corporation which were found to aggregate eight thousand dollars, should have been listed for taxation in this State. It was shown that the choses in action consisted of promissory notes, book accounts and other evidences of indebtedness and were kept in the office of such company in this State. The court said on page 263:

> "However, notwithstanding all this, doubtless the legal situs of this intangible property for most purposes, was that of the residence of the corporation, which, in law, is within the State by whose authority it was created."

In spite of this, however, the decision of the court as announced in the second syllabus on page 252, is as follows:

> "Choses in action, whether book accounts, promissory notes or the like, of foreign corporations that are kept in this State and arise out of the corporate business transacted here, are subject to taxation under the provisions of Section 2744, Revised Statutes."

This decision comes far nearer to deciding the exact point in issue in this case than any of the decisions cited by counsel for appellant, and yet the exact question as to whether investments in bonds owned by a non-resident of the State, if found within the State are taxable in Ohio, was not there presented. And this exact question does not appear to have ever been presented to the Supreme Court of Ohio, or to have been decided by that tribunal. That the municipal bonds owned by the Scottish Union and National

Insurance Company and deposited with the Superintendent of insurance and Treasurer of State were within the State of Ohio, and Franklin county, during the years 1895 to 1902, inclusive, is admitted. They were required by law to be in the State, and being so held, and used in the business of such foreign corporation transacted within the limits of the State, such bonds were required to be listed for taxation in Franklin county, at the place where they actually were, under Sections 2735 and 2744 of the Revised Statutes of Ohio.

II.

The Statutes of Ohio provide for the taxation of investments in bonds owned by Foreign Corporations.

The statutes of Ohio so far as they relate to the taxation of the personal property of foreign corporations found within this State have already been discussed by us in our brief. It is sufficient to notice the precise point made by appellant upon the language of the statutes of Ohio relating to such taxation. It is claimed that Sections 2731 and 2730 of the Revised Statutes of Ohio limit the taxation of investments in bonds to such bonds as are owned or controlled by persons residing within the State; that Section 2744, although it requires the president, secretary, or principal accounting officer of every insurance company, whether incorporated by any law of this State or not, to list for taxation all the personal property, which shall be held to include all such real estate as is necessary to the daily operations of the company, moneys and credits of such company or corporation, within the State, at the actual value in money, does not specifically provide for the return by such

persons of investments in bonds. That the term "personal property" as used in Section 2744 is not broad enough to include investments in bonds, because it must necessarily be construed in reference to the classification of property specified in Sections 2731 and 2730. The language of Judge Lurton in the opinion of the Western Assurance Company v. Halliday case, where he holds that the "'investments in bonds" required to be returned by foreign insurance companies, comes within the provisions of Section 2744 requiring the taxation of all "personal property" of the corporations therein named, is criticised because the construction of Section 2744 there adopted is inconsistent with the classification of subjects for taxation specified in said Sections 2730 and 2731.

Section 2731 forms no part of the taxing machinery of the State of Ohio. According to the decision of the Supreme Court of Ohio in *Chisholm v. Shields*, 67 Ohio St., 374, that is a declaratory statute, and the subsequent sections of the statutes are necessary to carry this declaratory section into execution, and the words used in Section 2731 do not expand the language used in the sections which follow. It may be said that neither does the language used in Section 2731 limit the language used in the provisions of the statutes which follow it. If Sections 2730 and 2731 were intended by the Legislature to exempt any property from taxation not expressly authorized to be exempted by the Constitution of Ohio, the same was null and void. The Constitution having required all investments in bonds to be taxed, it was not possible for the Legislature by the provisions of Section 2731 to say that only bonds of persons residing within the State should be taxed.

An examination of Section 2731 shows that it provides in the first section that:

> "All property, whether real or personal, in this State, and whether belonging to individuals or corporations; and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this State, shall be subject to taxation, except only such as may be expressly exempted therefrom."

This section uses the same classification as is used in Section 2 of Article XII of the Constitution of Ohio, and the language of Bartley, C. J., in construing this language of the Constitution in *Exchange Bank v. Hines*, 3 Ohio St., p. 1, and quoted by us above, is pertinent to the construction of the same language in this statute. The words, "all property, whether real or personal in this State," used in Section 2731 include all moneys, credits, investments in bonds, etc., of both domestic and foreign corporations.

It is far more important that Section 2744 of the Revised Statutes of Ohio should be construed so as to be consistent with the Constitution of Ohio than that the same should be consistent with the language of Sections 2730 and 2731 as construed by our opponents. The rule to be adopted in determining what the words "personal property" shall mean as used in Section 2744, it seems to us, is that announced by Bartley, C. J., in the case of *Exchange Bank v. Hines*, at page 18:

> "In the interpretation of legal instruments, words used out of abundant caution, are often to be tolerated at the expense of tautology. The object of the language of the Constitution under consideration (Sec. 2, Article XII) was comprehension, not exclusion. The words, "*all real and personal property*," therefore, in the second clause of this section, are to be taken in their most comprehensive legal import, including every

kind of real and personal property whatsoever, *not excepting* the several classes of personal property expressly mentioned in the first clause of the section."

If the words "personal property" in Section 2744 include investments in bonds, said section complies with Section 2 of Article XII of the Constitution. If those words do not include investments in bonds, not only are the investments in bonds of foreign corporations not required to be listed, but the investments in bonds of corporations residing within the State are equally not required to be listed under said section, and that class of property belonging to corporations, whether foreign or domestic, must escape taxation.

III.

Section 2745, Revised Statutes of Ohio, provides for a privilege tax and was not intended as an exclusive method of taxation for Foreign Insurance Companies.

The taxation provided for foreign insurance companies by Section 2745 of the Revised Statutes is not a tax upon property, but a tax upon the privilege of doing business within the State.

State ex rel. v. Reinmund, 45 Ohio St., 214 and 219, following the case of
Western Union Telegraph Co. v. Meyer, 28 Ohio St., 522.

In each of the cases just cited, such a tax as that imposed by Section 2745 of the Revised Statutes of Ohio is held to be a charge for the privilege of exercising franchises and powers within the State by foreign corporations.

It is conceded that Section 2745 was originally a proviso in the act which contained Section 2744.

The act in question was passed in 1853 and at that time Section 3660 requiring deposits of bonds by foreign insurance companies was not in force, it having been passed in 1867. At the time of the enactment of the taxing law of 1853, foreign insurance companies had no property subject to taxation within a State. The purpose of the proviso incorporated into that law, and now known as Section 2745, was for the purpose of requiring such corporations to pay some tax in Ohio. It was by way of a condition for the privilege extended to them of doing business within the State. Construing this section in the light of the conditions that existed at the time of its passage, it was the only available method of requiring foreign insurance companies at that time to pay any taxes whatever. There is nothing in the language of the section as originally passed which provided that Section 2745 should be an exclusive mode of taxation, or that the returns to be made by such foreign insurance companies should relieve them from making returns under Section 2744.

When the Legislature of 1867 passed a law requiring bonds to be deposited by foreign insurance companies as an additional condition precedent upon their right to do business within the State, such bonds were not exempted from taxation, neither by that language of that act or any other statute of the State of Ohio. In construing Sections 2731 and 2734 and 2744 of the Revised Statutes together, it is apparent that the personal property of all kinds, including moneys, credits, investments in bonds, stocks and joint stock companies of corporations, foreign or domestic, are required to be listed for taxation within the State of Ohio, and this construction is necessary in order that those statutes may be consistent with the constitutional requirements.

Counsel's construction, of necessity renders them unconstitutional and void.

The Legislature of Ohio has no power to enact a system of taxation for foreign insurance companies which shall be in lieu of the general laws relating to the taxation of their real and personal property. In the language of Bartley, J., in the *Exchange Bank v. Hines* case, on page 15:

> "It was the intention of the Constitution to provide an effectual barrier against a fruitful source of oppression and misrule, arising from inequalities in taxation, by putting an end to all legislative discretion as to *what* should be taxed, *what* should bear the heaviest burden of taxation, and *what* and *how much* should be exempted from taxation."

IV.

The Constitutionality of the Ohio Statutes providing for the collection of taxes.

The remaining part of the argument in brief for appellant is based upon the theory of counsel that a State can impose no obligation upon a non-resident to pay a tax on account of property belonging to such non-resident, having a situs for taxation and being taxed within such State. The contention is inconsistent with the decisions of this court in the following cases:

Bristol v. Washington Co., 177 U. S., 133.
Maryc v. Baltimore & Ohio Co., 127 U. S., 117.
Pullman's Palace Car Co. v. Pennsylvania, 141 U. S., 18.
American Refrigerator Transit Co. v. Hall, 174 U. S., 70.
Union Refrigerator Transit Co. v. Lynch, 177 U. S., 149.
Florida Central Ry. Co. v. Reynolds, 183 U. S., 475.

A State can impose an obligation to pay taxes upon a non-resident, who brings property within its territorial limits in consideration of the protection afforded said property; and upon failure to pay this obligation, to the extent of all its property within the State, said non-resident will be subject to the laws providing for the collection of said taxes.

The right of the State to impose an obligation upon the owner of property is a necessary incident of its right to tax the property of a non-resident.

The definition of taxes, that they are obligations created by legislative authority, is based upon the theory that the owner of property is charged by law with the duty of contributing to the support of that government which affords protection to his property.

Desty on Taxation, Sec. 6.
Florida Central Railway Co. v. Reynolds, 183 U. S., 475.
Bristol v. Washington County, 177 U. S., 133, 145.

If the State has the right to impose an obligation upon a non-resident it has the right to enforce that obligation by laws which operate only upon property within its territorial limits.

The State of Ohio, as a matter of right, imposed certain conditions upon such foreign insurance companies as desired to transact a part of their business with the State. The Scottish Union and National Insurance Company having accepted such conditions, and having agreed to comply with all the laws of the State of Ohio, can not now be heard to complain of the right of the State to tax the property voluntarily brought within the scope of its tax laws. Nor

can it deny the power of the State to collect such taxes from any property which it may have within the State.

Respectfully submitted,

EDWARD L. TAYLOR, JR.,
AUGUSTUS T. SEYMOUR,
KARL T. WEBBER,
Solicitors for Willis G. Bowland and L. Ewing Jones.

Supreme Court of the United States.

Nos. 360 and 361.—October Term, 1904.

The Scottish Union and National Insurance Company, Appellant, 360 *vs.* Willis G. Bowland, as Treasurer, and L. Ewing Jones, as Auditor of Franklin County, Ohio; Arthur I. Vorys, as Superintendent of Insurance, and William S. McKinnon, as Treasurer of the State of Ohio.	Appeals from the Circuit Court of the United States for the Southern District of Ohio.
Willis G. Bowland, as Treasurer, and L. Ewing Jones, as Auditor of Franklin County, Ohio, et al., Appellants, 361 *vs.* The Scottish Union and National Insurance Company.	

[February 20, 1905.]

These cases are cross-appeals from a decree rendered in the Circuit Court upon bill and demurrer. The Scottish Union and National Insurance Company, a corporation of Great Britain, filed its bill to enjoin the defendants Willis G. Bowland, Treasurer, and L. Ewing Jones, Auditor of Franklin County, Ohio; Arthur I. Vorys, Superintendent of Insurance, and William S. McKinnon, Treasurer, of the State of Ohio, from the collection of taxes levied on certain bonds deposited by the complainant under the laws of Ohio regulating the right of foreign insurance companies to do business in that State. It appears from the averments of the bill that the bonds were deposited under section 3660 of the Revised Statutes of Ohio, as amended in 1894. (91 Ohio Laws, 40.) They were municipal bonds of the county of Lucas and State of Ohio. Fifty thousand dollars thereof was deposited on September 14, 1894, and $50,000 on November 7, 1894. The bonds were registered in the name of the Superintendent of Insurance, in trust for the benefit and security of the policyholders of the insurance company, residing in Ohio, and were delivered by him to the State treasurer for safe keeping, and remained in the office of the treasurer of the State at Columbus, Franklin County, Ohio, until withdrawn on April 2, 1903, when United States bonds were substituted therefor.

The insurance company is transacting the business of insurance in Ohio, but it avers that its home office is in the city of Edinburgh, Scotland, and

its chief office and managing agency for this country is at Hartford, Connecticut, from which office it conducts its business in Ohio.

Acting under the Ohio statute, section 2781*a*, (94 Ohio Laws, 62,) the auditor of Franklin County, by notice served on one of the local agents of the Scottish Union and National Insurance Company, notified it to appear and show cause why the said bonds should not be taxed against it on the duplicate of Franklin County, Ohio, and taxes collected thereon for the years 1895 to 1900, inclusive. The auditor entered upon the tax duplicate taxes against the insurance company for $2,700 each for the years 1895 to 1900, inclusive, and $2,700 each for the years 1898 to 1900, inclusive, and five per cent penalty thereon. On November 15, 1900, the treasurer of Franklin County brought a civil action against the company for taxes so assessed. This action at the time of the filing of the bill was still pending in the Court of Common Pleas of Franklin County, Ohio.

On December 4, 1903, another notice was served upon the company, through its local agent, and the auditor entered taxes against such company for the years 1901, 1902 and 1903, in all the sum of $8,935.50. On April 2, 1904, the treasurer of Franklin County procured a warrant of distraint, and upon such warrant demanded of the superintendent of insurance and the state treasurer the United States bonds so substituted on April 2, 1903, for such municipal bonds, for the purpose of seizing and selling the same to satisfy the taxes which had been assessed against the company with respect to the municipal bonds for the years 1895 to 1900, inclusive. It is averred that to permit the collection of these taxes by suit for personal judgment or distraint will be violative of complainant's treaty rights as a subject of Great Britain, and will be taking complainant's property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

The prayer of the bill is, that the defendant, the treasurer of Franklin County, be restrained from collecting or attempting to collect any of the taxes against the complainant personally; that the said treasurer be restrained from collecting or attempting to collect said taxes or any portion of them by distraint against either such bonds of the United States so deposited or any personal property of complainant which may now or hereafter be situated in the county of Franklin or the State of Ohio; that the defendants, the superintendent of insurance and treasurer of the State of Ohio, be enjoined from delivering or attempting to deliver said United States bonds or any part thereof to the said county treasurer, and for such other relief as equity and good conscience may require.

The respondents having interposed demurrers to the bill, the court held that the municipal bonds on deposit in Ohio were subject to taxation under the laws of the State; that there was no personal liability of the complainant on account of said taxes, and therefore a civil action to recover the taxes

should be enjoined; that for the year 1903 the collection of taxes could not be enforced, as the United States bonds were substituted before the time for returning property for that year; that the bonds might be seized by distraint to satisfy the taxes levied upon the municipal securities for the years they were on deposit, and the court therefore refused to enjoin the execution of the distress warrant except for the taxes and penalty for the year 1903, and rendered a decree enjoining the collection of the taxes by civil action.

Both parties appealed, the company from so much of the decree as permitted distraint of the United States securities for the collection of taxes levied with respect to the municipal bonds, the treasurer and auditor of Franklin County from so much of the decree as denies the right of the State to prosecute a civil action against the company to recover the taxes aforesaid, and from so much thereof as restrained the officials from attempting to collect the taxes assessed against the municipal bonds for the year 1903.

Mr. Justice DAY, after making the foregoing statement, delivered the opinion of the Court.

These cases may be considered together, as they are appeals from a single decree and involve the right to assess and collect taxes upon the municipal bonds deposited by the insurance company under the laws of Ohio.

A considerable part of the opinion of the court below and the discussion in the briefs of counsel goes to the question of the power of the State to tax bonds, held as these were, within its jurisdiction. At the oral argument, however, the learned counsel representing the insurance company conceded that there was legislative power to impose the taxes in question. A reference to the decisions of this court makes it perfectly plain that such taxation is within the power of the State. (*New Orleans* v. *Stemple*, 175 U. S. 309; *Bristol* v. *Washington Co.*, 177 U. S. 133; *Blackstone* v. *Miller*, 188 U. S. 189; *Board of Assessors* v. *Comptoir National*, 191 U. S. 388, 403; *Carstairs* v. *Cochran*, 193 U. S. 10.)

The contention for the company is, that conceding the power of the State, it has never been exercised in the only way to make it effectual, which is by statutory enactment, and that the policy and statutes of Ohio have never authorized taxation of bonds deposited under the conditions shown in this case.

The question, therefore, is, have the statutes of Ohio, read in the light of the construction placed upon them by the Supreme Court of the State, conferred the right to tax these municipal bonds?

Before entering upon a consideration of the statutes we may say, in general terms, that we agree with the learned counsel for the insurance company, that the scheme of taxation of personal property in Ohio involves

the requirement that it shall be returned or listed by some person or corporation whose duty it is by law to return or list such property. Provision is not made for assessing or taxing personal property by proceedings *in rem*, but before a recovery for taxes can be justified, either by action or distraint, it must appear that it was required to be returned for the purpose of taxation under some law of the State.

The proceedings under which the taxes for the years included in this case were charged against the insurance company by the auditor of Franklin County are under a statute, (Revised Statutes of Ohio, section 2781*a*,) having for its purpose the correction of returns by those whose duty it was to return property for taxation, and making correction of returns so as to include property which should have been returned, but had been omitted, by some person charged by law with that duty.

Was it the duty of the insurance company or any one acting for it to return these municipal bonds for taxation? They were required to be deposited under section 3660, Rev. Stat. of Ohio, as amended, which reads as follows:

"SEC. 3660. [*Certain companies must make deposit.*]—A company incorporated by or organized under the laws of a foreign government shall deposit with the superintendent of insurance, for the benefit and security of its policyholders residing in this State, a sum not less than one hundred thousand dollars in stocks or bonds of the United States, or the State of Ohio, or any municipality or county thereof, which shall not be received by the superintendent at a rate above their par value; the stocks and securities so deposited may be exchanged from time to time for other like securities; so long as the company so depositing continues solvent and complies with the laws of this State, it shall be permitted by the superintendent to collect the interest or dividends on such deposit; and for the purposes of this chapter the capital of any foreign company doing fire insurance business in this State shall be deemed to be the aggregate value of its deposits with the insurance or other departments of this State and of the other States of the United States, for the benefit of policyholders in this State, or in the United States, and its assets and investments in the United States, certified according to the provisions of this chapter; but such assets and investments must be held within the United States and invested in and held by trustees, who must be citizens of the United States, appointed by the board of directors of the company, and approved by the insurance commissioner of the State where invested, for the benefit of the policyholders and creditors in the United States; and the trustees so chosen may take, hold and convey real and personal property for the purpose of the trust, subject to the same restrictions as companies of this State." [91 v. 40; 70 v. 147, § 21; (S. & S. 212).]

This section is part of the chapter of the Ohio statutes regulating insurance companies other than life. In the same chapter may be found other sections regulating the manner of doing business in Ohio by insurance companies, and in section 3637 we find a provision as to how the capital of domestic insurance companies shall be invested, and such companies are

required to invest their capital in certain United States, State, county and municipal bonds, etc. These domestic companies are in like manner required to deposit such securities with the commissioner for the benefit of their policyholders, (Rev. Stat. of Ohio, §§ 3593, 3595,) and without such deposit are not authorized to do business within the State. As a condition of doing business in Ohio companies organized under the laws of foreign governments are, by section 3660, required to invest a portion of their capital in the stock or bonds of the United States or of the State of Ohio, or some municipality or county thereof, and make deposit of such bonds with the superintendent of insurance for the benefit of local policyholders. Subsequent provisions of the section further show that this deposit is to be regarded as a part of the capital of such foreign insurance company which may be considered in determining the aggregate capital of the company required by law. The companies are permitted to collect the interest or dividends on the securities. These deposits constitute a fund primarily for the benefit of such policyholders, and after their claims are satisfied may be turned over to an assignee or devoted to other purposes. (*Falkenbach* v. *Patterson*, 43 O. S. 359; *State* v. *Matthews*, 64 O. S. 419.)

This statute, therefore, provides for the manner of investment of a portion of the capital stock of a foreign insurance company within the State of Ohio for the protection of the policyholders within the State. It is more than a mere "investment in bonds." It is also a part of the capital stock required to be deposited as a condition of doing business within the State and devoted to the benefit of local stockholders.

The authority to enact laws for the imposition of taxes is found in the Constitution of the State, article 12, section 2, which provides: "Laws shall be passed, taxing by a uniform rule all moneys, credits, investments in bonds, stock, joint stock companies, or otherwise; and also all real and personal property according to its true value in money."

Section 2731 provides, in language similar to that used in the Constitution, for the taxation of all property, real and personal, in the State, and all moneys, credits, investments in bonds, stock, or otherwise, of persons residing in the State. This section is found in the first chapter of Title 13, "Taxation," of the Ohio Statutes, and is in part in the following language:

"SEC. 2731. All property, whether real or personal, in this State, and whether belonging to individuals or corporations; and all moneys, credits, investments in bonds, stock, or otherwise, of persons residing in this State, shall be subject to taxation, except only such as may be expressly exempted therefrom; and such property, moneys, credits, and investments shall be entered on the list of taxable property as prescribed in this title."

The argument for the insurance company is, that this preliminary section, read with the other sections of the Ohio law upon the subject, excludes "investment in bonds" from being embraced in a general description of

personal property, and limits their taxation to persons residing in the State, or (under section 2730) where they are held within the State for others by persons residing therein.

Section 2730 of the same chapter is a section giving definitions of terms used in the title. So far as it is pertinent in this connection, that section is as follows:

"SEC. 2730. The term 'investments in bonds' shall be held to mean and include all moneys in bonds or certificates of indebtedness, or other evidence of indebtedness of whatever kind, whether issued by incorporated or unincorporated companies, towns, cities, villages, townships, counties, States or other incorporations, or by the United States, held by persons residing in this State, whether for themselves or others."

If these sections embraced all the statutory law of the State, together they tax investments in bonds held by residents, because of jurisdiction over the person of the owner, and those held by residents for other owners, and if such reside out of the State, because of jurisdiction over the property held within the State.

Section 2744 undertakes to make provision for the taxation of corporations generally, and is as follows:

"SEC. 2744. [*Corporations generally; their returns.*]—The president, secretary and principal accounting officer of every canal or slackwater navigation company, turnpike company, plank-road company, bridge company, insurance company, telegraph company or other joint stock company, except banking or other corporations whose taxation is specifically provided for, for whatever purpose they may have been created, whether incorporated by any law of this State or not, shall list for taxation, verified by the oath of the person so listing, all the personal property, which shall be held to include all such real estate as is necessary to the daily operations of the company, moneys and credits of such company or corporation within the State, at the actual value in money, in manner following: In all cases return shall be made to the several auditors of the respective counties where such property may be situated, together with a statement of the amount of said property which is situated in each township, village, city or ward therein. The value of all movable property shall be added to the stationary and fixed property and real estate, and apportioned to such wards, cities, villages or townships, *pro rata*, in proportion to the value of the real estate and fixed property in said ward, city, village or township, and all property so listed shall be subject to and pay the same taxes as other property listed in such ward, city, village or township. It shall be the duty of the accounting officer aforesaid to make return to the auditor of State during the month of May of each year of the aggregate amount of all property by him returned to the several auditors of the respective counties in which the same may be located. It shall be the duty of the auditor of each county, on or before the first Monday of May, annually, to furnish the aforesaid president, secretary, principal accounting officer or agent the necessary blanks for the purpose of making aforesaid returns; but no neglect or failure on the part of the county audi-

tor to furnish such blanks shall excuse any such president, secretary, principal accountant or agent from making the returns within the time specified herein. If the county auditor to whom returns are made is of opinion that false or incorrect valuations have been made, or that the property of the corporation or association has not been listed at its full value, or that it has not been listed in the location where it properly belongs, or in cases where no return has been made to the county auditor, he is hereby required to proceed to have the same valued and assessed: *Provided*, that nothing in this section shall be so construed as to tax any stock or interest in any joint stock company held by the State. [73 v. 139, § 16; (S. & C. 1446).]

This section is broad in its terms, and requires the return of the property, among others, of insurance companies, whether incorporated by the laws of Ohio or not, and such companies are required to list for taxation "all the personal property, which shall be held to include all such real estate as is necessary to the daily operations of the company, moneys and credits of such company or corporation within the State, at its actual value in money."

The Supreme Court of Ohio has expressly held that this section applies to foreign as well as domestic corporations. (*Hubbard* v. *Brush*, 61 O. S. 252; *Lander* v. *Burke*, 65 O. S. 532–542.)

This section, therefore, requires of both foreign and domestic insurance companies that they return the personal property mentioned which is within the State. What is meant by "personal property," in this connection? Referring to section 2730 we find it provided that the terms "personal property," when used in the title, shall be held to mean and include, among other things, the capital stock, undivided profits and all other means not forming a part of the capital stock of every company.

In the case of domestic corporations, and assuming that this statute applies, as has been held by the Supreme Court of Ohio, with equal force to foreign corporations, this definition of personal property must be held to include not only the paid in capital stock of the company, but as well the bonds, or securities in which it may be invested.

This question was before the Supreme Court of Ohio in *Jones* v. *Davis*, (35 O. S. 474.)

In that case the act of May 11, 1878, was before the court. It contained provisions similar to those of the Revised Statutes, requiring personal property of every description, moneys and credits, investments in bonds, stock, joint stock companies, or otherwise, to be listed in the name of the person who is the owner thereof on the day preceding the second Monday of April in each year.

Section 11 of that act made provisions similar to those found in section 2744, requiring incorporated companies to list for taxation all their personal property which, by the terms of the statute, was made to include all

such real estate as was necessary to the daily operation of the company, and all its moneys and credits within the State at their actual value in money. After citing *Bank Tax Case*, (2 Wall. 208,) and *Farrington* v. *Tennessee*, (95 U. S. 686,) Judge Boynton, delivering the opinion of the court, said:

"For the purpose of taxation, the capital stock is represented by whatever it is invested in. Personal property, by the express wording of the statute, is made to include the capital stock of a corporation; and the provision above referred to requires all corporations doing business in this State, except banking and others whose taxation is specifically provided for, to list all their personal property, including in the return thereof all such real estate as is necessary to the daily operation of their business, together with their moneys and credits of every description within the State. That the legislature intended, by this description of property, to embrace the capital stock of the company is too obvious to be misunderstood. No other meaning can be drawn from the language employed, and no other construction is better calculated to do justice."

In *Lee* v. *Sturgis*, (46 O. S. 153, 160,) Judge Spear, speaking for the court, said:

"It may be assumed that 'capital stock' and 'capital and property' mean practically the same thing. Primarily the capital stock is the money paid in by the stockholders in compliance with the terms of their subscription. It soon, however, takes the form of real estate or personal property, or both, including machinery, buildings, credits, rights in action, etc. So that it may here be taken to mean personal property, and such real estate as may be necessary to the daily operations of the company and its moneys and credits. The capital is thus represented by the property in which it has been invested."

We think this language pertinent in the consideration of the case before us. While technically the bonds deposited with the insurance commissioner are investments in bonds, they are also a part of the capital stock of the company invested in Ohio, and required to be so invested for the security of domestic policyholders, and, for the purposes of taxation, to be considered a part of the capital stock of the company and included within the definition of "personal property," as given in section 2730.

This conclusion is reinforced by the decision in *Hubbard* v. *Brush*, (61 O. S. 252.) In that case the Supreme Court of Ohio held that a foreign corporation transacting business in Ohio was required to return its property within the State where it was carrying on business, although the corporation was organized under the laws of West Virginia.

The court admitted that the situs of intangible property is ordinarily at the local residence of the corporation, within the State where it was incorporated. Nevertheless, as the promissory notes and book accounts and other evidence of indebtedness must be presumed to have been in the company's office in this State, they were taxable as personal property under section 2744.

In the course of the opinion Judge Bradbury said:

"Where foreign corporations voluntarily bring their property and business into this State to avail themselves of advantages found here, which they believe will enhance the probabilities that the business they intend to pursue will be profitable, they should not be heard to complain of laws which tax them as domestic corporations are taxed by the State. We hold, therefore, that the provisions of section 2744, which make it the duty of foreign corporations to list for taxation in this State their choses in action, where they are held within this State and grow out of the business they conduct herein, is a valid exercise of the taxing powers vested in the State."

Under section 2744, corporations, foreign and domestic, are required to return all personal property for taxation, which, among other things, the statute expressly declares shall include moneys and credits of such company or corporation within the State. If the construction contended for shall prevail, a corporation, with capital invested in bonds, would escape taxation, while one holding its investments in notes or certificates of deposit in bank will be compelled to return them for taxation—a condition of things so manifestly unjust that we cannot hold it to have been within the intent of the legislature in framing taxing laws unless the statutes clearly admit of no other construction. The purpose of the Ohio constitution and statutes passed in pursuance thereof, as has been frequently declared by the Supreme Court of Ohio, is to tax by a uniform rule all property owned or held within the State. A narrow construction, which will defeat this purpose, should not be adopted.

The statutes, specifically mentioning "investments in bonds," were intended to reach and tax, and not to exempt, that class of personal property. The purpose to tax all real and personal property, declared in the statute, was further emphasized by express mention of certain classes of property, such as investments in bonds, so that by no process of exclusion could such securities escape the burdens imposed upon all property owned or held within the State.

The sections taxing individuals holding such securities were not intended to put limitations upon other sections of the law taxing the property of corporations held within the State and enjoying the protection of its laws, and affording a basis for credit in the transacting of business. There is no reason why the law should tax such securities in the hands of individual residents, whether owned or held by them for others, and permit them to escape taxation when they represent invested capital of incorporated companies, sharing the protection of the Government and equally bound in morals, at least, to help bear the burdens of the State.

That such securities might justly be taxed was freely admitted in the argument at bar, and the sole contention was that the lack of statutory power to tax these securities is a *casus omissus* in legislation which the courts cannot supply.

It may be conceded that no tax can be levied without express authority of law, but the statutes are to receive a reasonable construction with a view to carrying out their purpose and intent.

We have examined the decisions of the Supreme Court of Ohio, cited by counsel, construing the statutes of the State, and believe none of them to be inconsistent with the conclusions we have reached, and those above cited, in our opinion, are direct authority for the construction given. All the sections must be construed together to attain the object and intent of the law. Section 2731, standing alone, might limit the right to tax investments in bonds to residents of the State. It is certainly enlarged by section 2730 to include such investments when held for others by residents within the State. Read with sections 2734, 2735, 2744 and 2746, we think the purpose is manifest to require the return and taxation of all personal property, except the small exemptions allowed, within the jurisdiction of the State.

But it is urged if section 2744 could otherwise be held to require a return of these bonds by the insurance company, that the company comes within the exception of the statute excluding banking or other corporations whose taxation is specifically provided for in other parts of the title. And it is argued that section 2745 of the Revised Statutes of Ohio makes express provision for the taxation of foreign insurance companies.

Examination of this section shows that it imposes a tax upon the business of the company in Ohio, and is not a property but a privilege tax. Insurance companies are required to return in each county the amount of the gross premium receipts of its agency for the previous calendar year, and under certain regulations the company is taxed upon the amount of business done.

This section does not levy a tax upon property. There are subsequent statutory provisions of a special character, upon which the exception of section 2744 may operate, taxing the property of railroad companies, banks, express, telegraph and telephone companies, etc., but there is no other provision imposing a property tax upon foreign insurance companies within the State.

The requirement that these bonds should be deposited for the security of the local policyholders brought a part of the capital of such company into the State of Ohio upon the strength of which it transacts its business and obtains credit within the State. Clearly, such property is not intended to be taxed within the provisions reaching the business done in the State of Ohio under section 2745.

But it is said that there is no person within the State required to return this property. We think it is the duty of the officers of the insurance company, under section 2744, to return the property, and that the place to return it is where the property is situated. This is clearly required by the terms of this section, and section 2735, making provision for the place of listing personal property, provides:

"And all other personal property, moneys, credits, and investments, except as otherwise specially provided, shall be listed in the township, city, or village in which the person to be charged with taxes thereon may reside at the time of the listing thereof, if such person reside within the county where the same are listed, and if not, then in the township, city, or village where the property is when listed."

These bonds were the property of the corporation taxable under the statutes, and, at the time when they should have been listed, were held in the city of Columbus, Franklin County, Ohio, and should have been there returned.

It is further argued that to distrain the property of the company for the collection of these taxes would be a violation of the constitutional rights of the insurance company, and the taking of its property without due process of law. Section 1095 provides:

"SEC. 1095. [*Overdue taxes may be collected by distress.*]—When taxes are past due and unpaid, as stated in the preceding section, the county treasurer, or his deputy, may distrain sufficient goods and chattels belonging to the person or persons charged with such taxes, if found within his county, to pay the taxes so remaining due and the costs that have accrued; and shall immediately proceed to advertise the same in three public places in the township where such property was taken, stating the time when, and the place where, such property will be sold; and if the taxes and costs which have accrued thereon are not paid before the day appointed for such sale, which shall be not less than ten days after the taking of such property, such treasurer, or his deputy, shall proceed to sell such property at public vendue, or so much thereof as will be sufficient to pay said taxes and the costs of such distress and sale. (29 v. 291, Sec. 19; S. & C. 1586.)"

This section authorizes the distraint of goods to satisfy taxes lawfully levied against property within the county and State. This method of collecting taxes is one of the most ancient known to the law, and has frequently received the sanction of the courts. (*Murray's Lessees* v. *Hoboken*, 18 How. 272, 276; *Springer* v. *United States*, 102 U. S. 586; Cooley on Taxation, 302; *Palmer* v. *McMahon*, 133 U. S. 660.)

There is nothing in the exemption of Government bonds from taxation which prevents them from being seized for taxes due upon unexempt property. We have held that the taxes were lawfully assessed. The statute authorizing a distraint gave the right to proceed against personal property within the jurisdiction of the State. The taxes were lawful, and the property belonging to a foreign corporation which could be seized within the authority of the State might be taken under this statute, and we do not perceive that any constitutional right of the company is violated by seizing its property under such circumstances. (*Bristol* v. *Washington Co.*, 177 U. S. 133; *Marye* v. *Baltimore & Ohio Ry. Co.*, 127 U. S. 117.)

As to the right to assess taxes for the year 1903, it appears that these municipal bonds were withdrawn from the State some time before the return

day, which is the day preceding the second Monday in April, and such withdrawal was in the exercise of a lawful right of the company so to do, and other securities were substituted as provided by law. We do not think that the fact that it had bonds in the State for a time which were taxable justified the imposition of this tax, where the non-taxable securities were substituted before the return day.

As to the question of personal liability of the insurance company to judgment in an action brought to recover the amount of the taxes, we think the court should not have issued an injunction, as was done, against the prosecution of civil suits for this purpose. If there is no personal liability for these taxes—a point which we do not feel called upon to decide—it is perfectly clear that if service could be had which would make a personal judgment proper, the company could set up its defence by answer in the action at law, and there is no necessity to resort to a court of equity for relief. It will be presumed, if the claim of the company is right, no personal judgment will be rendered against it, and if its theory of the controversy is correct no such judgment can be lawfully rendered. In such case the authorities are uniform that equity will not interfere by injunction, but leave the party to his defence at law. (Revised Statutes of United States, § 723; *Insurance Company* v. *Bailey*, 13 Wall. 616–623; *Grand Chute* v. *Winegar*, 15 Wall. 373; *Dewcese* v. *Reinhard*, 165 U. S. 386.)

Upon the whole case we reach the conclusion that the Circuit Court was right in sustaining the demurrer so far as the bill averred the non-taxability of these bonds, or the right of the treasurer to proceed by distraint, and in overruling the demurrer as to the taxes for the year 1903; but, for the reasons stated, erred in enjoining the prosecution of a civil action seeking a personal judgment.

In this view, the decree below will be reversed and the cause remanded for further proceedings in conformity to this opinion.

True copy.

Test:

Clerk Supreme Court, U. S.